

THE TREATMENT OF CONFIDENTIAL INFORMATION BY THE FEDERAL TRADE COMMISSION: THE HEARING

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Shortly after the first Kennedy appointees took office in 1961, the Federal Trade Commission abandoned its "peripatetic" approach to hearing contested cases and adopted the rule of continuous hearings which generally prevails in the courtroom.¹ This development, along with increasing Commission awareness of the needs of fairness, has meant that discovery requests no longer involve only a question of preserving the confidentiality of FTC files or of agency discretion. When interrupted hearings were the rule, the respondent had time to develop alternative sources of information; now that avenue may not be available.

This fact was perceived by the Commission, which gradually has evolved rules of discovery not dissimilar to the Federal Rules governing civil actions. During the past six years, the agency has overhauled its procedural rules on three occasions and, in the process, has relaxed many restrictions on the taking of depositions. At first, orders to take depositions were granted solely to preserve testimony; then only if the moving party demonstrated "good cause" for taking the deposition; and, finally, if the party showed that the deposition would constitute or contain evidence.² Now, the need for information concerning the Commission's case in order to facilitate preparation of respondent's defense may be sufficient support for a request to a hearing examiner for an order to take a deposition.³ (Because of the Commission's ex-

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¹ FTC Procedures and Rules of Practice § 4.14(d), 26 Fed. Reg. 6019 (1961), now 16 C.F.R. § 3.16(d) (1967); see Address of Commissioner Philip Elman, The Administrative Process and the Rule of Law, American Marketing Ass'n 21, June 20, 1961. But see Thermochemical Prods., Inc., FTC Dkt. No. 8725, 3 TRADE REG. REP. ¶ 18,062 (1967).

² See Mezines & Parker, *Discovery Before the Federal Trade Commission*, 18 AD. L. REV., Winter-Spring, at 55 (1966).

³ FTC Procedures and Rules of Practice § 3.33, 32 Fed. Reg. 8451-52 (1967), as amended, 32 Fed. Reg. 9158 (1967) [current rules hereinafter cited as FTC Rules]. See All-State Indus., Inc., FTC Dkt. No. 8738, 3 TRADE REG. REP. ¶ 18,103, at 20,550 (1967):

The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding.

tensive investigative powers which are generally used to develop the evidence necessary to support complaint counsel's case, the rule changes have in practice affected only respondent's once non-existent right of discovery.⁴). Further impetus for expanded discovery of confidential information has been added by the passage of the so-called Freedom of Information Act,⁵ which became effective this past July fourth. The swift pace of these events, on the other hand, has resulted in ad hoc and sometimes inconsistent rulings.

In contrast to these developments in the discovery area, Commission policies requiring open hearings and full public disclosure of evidence have changed little since these policies were elaborated in 1961.⁶ Rulings still tend to chant the time-honored slogans supporting public trials, without considering whether the resulting harm may outweigh any possible benefits. Nor has anyone probed the apparent double standard of confidentiality applied in FTC hearings, which favors disclosure of private business secrets while protecting the secrecy of government files. Current judicial criticism of the FTC practice of delivering publicity releases to the press on issuance of a complaint,⁷ indirectly suggests, however, that a re-examination of public hearing axioms may be in order.

Moreover, recent Supreme Court decisions in the area of criminal procedure raise serious questions about the fairness of agency rulings on confidentiality.⁸ Developments in criminal procedure, of course, are not necessarily controlling in administrative proceedings. But recent Supreme Court decisions relating to criminal discovery reflect a growing concern for what elemental fairness or, specifically, due process, may require. There should be no hesitancy in applying criminal law discovery rules to the extent that similar fairness demands are present in agency proceedings. Nor is this suggestion novel. Administrative procedure always has been subject to due process limitations;⁹ thus, statements by government witnesses in FTC hearings must be made available to respondent during the hearing for purposes of cross-

⁴ But see *Associated Merchandising Corp.*, FTC Dkt. No. 8651, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,335 (1965).

⁵ 5 U.S.C.A. § 552 (Supp. II 1967). But see *Statesman Life Ins. Co.*, FTC Dkt. No. 8686, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,790 (1966).

⁶ See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961) [hereinafter cited as *Hood*].

⁷ See *Marlo Furniture Co. v. FTC*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶72,194 (D.D.C. Aug. 16, 1967); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 5 TRADE REG. REP. (1967 Trade Cas.) ¶72,072 (D.D.C. April 13, 1967). See also *Statesman Life Ins. Co.*, FTC Dkt. No. 8686 (Dec. 22, 1967).

⁸ See, e.g., *Miller v. Pate*, 386 U.S. 1 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963).

⁹ E.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940); *Landoner v. Denver*, 210 U.S. 373 (1908); *Communist Party of the United States v. SACB*, 254 F.2d 314, 327 (D.C. Cir. 1958).

examination—a rule first applied by the Supreme Court to criminal prosecutions.¹⁰ Current questions in the criminal area which ultimately may affect FTC practices involve the scope of the agency's obligation to disclose information which might aid the defense, including evidence supporting respondent's case or identifying non-party complainants.

Despite the frequency of contested demands for sensitive information, few attempts have been made to consider the policies involved in determining whether government or business information asserted to be confidential shall be disclosed, and, if so, whether disclosure must be made in full public view.¹¹ Nor have standards governing the treatment of confidential matter been developed adequately. The basic questions are readily identifiable: What constitutes confidential information? Who should determine whether it is confidential? How should confidential information be treated? The development of responsible policy, however, will depend upon several additional factors: Why is the material asserted to be sensitive? For what purpose is disclosure or discovery sought? In what way would public disclosure be beneficial—or harmful? This study examines these and related questions in the context of Federal Trade Commission practice.

The traditional order of analysis is reversed here in two respects. Since agency procedures commonly follow earlier judicial developments, this discussion, contrary to common law tradition, first will examine the general principles regarding judicial trials and then the specifics of FTC practice. In addition, since the FTC first explored the question of confidentiality at the hearing level (that is, trial stage) of its proceedings, consideration of problems at the investigative and pre-trial stage will be postponed to a subsequent article,¹² while treatment of sensitive data at the trial stage is examined here.

PUBLIC HEARINGS

The current controversy surrounding fair trial and free press reflects the age-old conflict between the benefits and perils which flow from public trials. The premise underlying public trials is that publicity "operates as a check upon [the] mendacity and incorrectness" of witnesses and "keeps the judge himself, while trying, under trial."¹³ The

¹⁰ See *Jencks v. United States*, 353 U.S. 657 (1957); *Communist Party of the United States v. SACB*, 254 F.2d 314 (D.C. Cir. 1958).

¹¹ Cf. Newman, *Federal Agency Investigations: Procedural Rights of the Subpoenaed Witness*, 60 MICH. L. REV. 169, 172 (1961).

¹² Both studies are limited to FTC treatment of confidential information in adjudicative and investigative proceedings. This does not exhaust the problems of confidentiality faced by the Commission. For example, the related problem of "secret law" in FTC practice explored in other contexts by Professor Davis are outside the scope of this article.

¹³ 1 J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 522, 523 (1827).

openness of hearings not only protects the parties, but also serves to inform the bar and public. In general, the pervasive rule, grounded on common law precedents,¹⁴ constitutional commands¹⁵ and statutory requirements,¹⁶ is that a judicial trial shall be conducted openly, with all evidence available to public scrutiny. The lessons of the infamous Star Chamber have become categorical imperatives. Thus, it is agreed: "Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account."¹⁷

Adhering to the judicial pattern, administrative agency hearings on adjudicatory matters, with few exceptions, are public. Indeed, the enabling legislation of many agencies requires that adjudicatory hearings be public.¹⁸ The Federal Trade Commission Act contains no such congressional expression.¹⁹ Nevertheless, the Commission's practice, almost since its inception, has been for proceedings to become a matter of public record upon service of the complaint.²⁰ As a result, challenges have been raised, not to the Commission's refusal to grant a public hearing, but rather to its insistence that all hearings be open to the public—and the press. For example, in *E. Griffiths Hughes, Inc. v. FTC*,²¹ a distributor, whose advertisements of the medicinal qualities of its bath salts outran the product's laxative abilities, argued that until the FTC had determined finally that its activities constituted an unfair trade practice, the Commission's function was wholly inquisitorial and necessarily secret. The court upheld the Commission's public hearing rule, however, on the ground that the FTC Act provision specifically permitting third-party intervention²² is rendered meaningless unless the proceeding is public. Moreover, the Commission is authorized to adopt rules necessary to carry out the policies of the Act,²³ and open

¹⁴ 6 J. WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

¹⁵ *E.g.*, U.S. CONST. amend. VI; CAL. CONST. art. I, § 13; ILL. CONST. art. II, § 9; IND. CONST. art. I, § 13; MICH. CONST. art. I, § 20; N.J. CONST. art. I, § 10; ORE. CONST. art. I, § 11.

¹⁶ *E.g.*, WIS. STAT. ANN. §§ 252.155, 256.14 (1957); *see* FED. R. CIV. P. 43(a), 77(b).

¹⁷ 1 J. BENTHAM, *supra* note 13, at 524.

¹⁸ *See, e.g.*, Securities and Exchange Act of 1933, § 21, 15 U.S.C. § 77u (1964); Interstate Commerce Act § 17(3), 49 U.S.C. § 17(3) (1964).

¹⁹ Section 5(b) of the FTC Act merely states that the Commission shall conduct a "hearing." 15 U.S.C. § 45(b) (1964). *Cf.* *FTC v. Flotill Prods., Inc.*, 88 S. Ct. 401, 403 (1967).

²⁰ *See E. Griffiths Hughes, Inc. v. FTC*, 63 F.2d 362, 363 (D.C. Cir. 1933); *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020, 1022 (D.D.C. 1963); S. Doc. No. 186, 76th Cong., 3d Sess., pt. 6, at 14 (1940); *cf.* *FCC v. Schreiber*, 381 U.S. 279 (1965). The current requirement for public hearings is stated in FTC Rules § 3.41(a). At one time the Commission treated the Hearing Examiner's report as a confidential document. *See Arnold Stone Co. v. FTC*, 49 F.2d 1017 (5th Cir. 1931).

²¹ 63 F.2d 362 (D.C. Cir. 1933).

²² FTC Act § 5(b), 15 U.S.C. § 45(b) (1964).

²³ FTC Act § 6(g), 15 U.S.C. § 46(g) (1964).

hearings are consistent with the FTC's overall function. Although it was not mentioned by the court, it also could be argued that, in light of the theory supporting public hearings, the public interest may require that adjudicatory proceedings be open unless overriding considerations are present.²⁴

EVIDENTIARY LIMITS ON PUBLIC TRIALS

The drive for publicity does not end with the rule of public trials and hearings; coupled with this requirement is the general duty incumbent upon all citizens to give testimony. "[T]he public has a right to every man's evidence,"²⁵ even if a witness's privacy, time and labor must be sacrificed. Because the demand comes from the community as a whole, rather than from the parties, and because the obligation is essential to any search for justice, "all privileges of exemption from this duty are exceptional."²⁶

Nonetheless, numerous evidentiary exceptions are recognized which limit public disclosure of facts and hence impinge upon the principle of universal publicity.²⁷ The principal examples are evidentiary privileges relieving a witness of his testimonial obligation to disclose confidential communications or to make self-incriminating statements. Such privileges also may bar the disclosure of government and trade secrets or preclude the admissibility of illegally obtained evidence. These limitations on universal publicity are justified as necessary for the protection of interests and relationships which are regarded as having sufficient social importance to warrant the sacrifice of full factual disclosure.²⁸ Since this rationale is equally applicable to agency trials, it has been asserted that evidence privileged in civil proceedings is, in principle, privileged in administrative hearings.²⁹

²⁴ See also *Morgan v. United States*, 304 U.S. 1, 14, 18-19 (1938); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (dictum).

²⁵ 12 D. COBBETT'S PARLIAMENTARY HISTORY 675, 693 (1812), quoted in 4 J. WIGMORE, EVIDENCE § 2192, at 2965-66 (1st ed. 1905). See generally 8 J. WIGMORE, EVIDENCE § 2192 (McNaughton rev. ed. 1961).

²⁶ 8 J. WIGMORE, EVIDENCE, *supra* note 25, § 2192, at 73 (emphasis omitted).

²⁷ For example, exclusionary rules deny the admission of hearsay and opinion testimony into evidence. Secondary evidence is similarly barred. These rules of exclusion are designed to aid the process of determining the facts by guarding against evidence which may be unreliable or likely to mislead. See generally C. McCORMICK, EVIDENCE, chs. 3, 23, 25 (1954). They are unrelated to the problem of confidentiality in administrative proceedings, however, for two reasons: (1) their application is restricted in administrative hearings, 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.01 (1958) [hereinafter cited as DAVIS TREATISE]; see *John Bene & Sons, Inc. v. FTC*, 299 F. 468 (2d Cir. 1924); and (2) the sensitivity of the information is not the basis for exclusion.

²⁸ See generally C. McCORMICK, *supra* note 27, ch. 8.

²⁹ Cooper, *Federal Agency Investigations: Requirements for the Production of Documents*, 60 MICH. L. REV. 187, 202 (1961); see 2 DAVIS TREATISE § 14.08, at 286-87.

Testimonial Privileges

Several evidentiary privileges are obviously inapplicable to FTC hearings. Testimony concerning marital communications and physician-patient consultations generally does not occur in Commission hearings, because these privileges usually apply only to personal, non-business communications, while FTC hearings invariably involve business firms and activities. Similarly, the fifth amendment privilege against self-incrimination is generally inapplicable to Commission hearings, since it only protects natural persons, and since section 9 of the FTC Act confers immunity from criminal prosecution for such compelled testimony.³⁰ Problems involving the admissibility of confessions are also not present, because the Commission has only civil jurisdiction.³¹

Other questions of privilege arise only infrequently and, if the policy sought to be promoted by the privilege applies equally to an administrative hearing, the privilege is accepted readily by the Commission. For example, the attorney-client privilege is explicitly recognized in Commission cases denying disclosure of government documents.³² Presumably, because it is designed to protect a relationship which is a predicate to fair adjudicative hearings,³³ it also applies to communications between respondent and its counsel. In one unusual FTC case which involved illegally obtained evidence, the only question considered by the Commission was whether the facts came within the constitutional exclusionary rule.³⁴ There was no doubt that the con-

³⁰ FTC Act § 9, 15 U.S.C. § 49 (1964); see *Sherwin v. United States*, 268 U.S. 369 (1925); *FTC v. Harrell*, 313 F.2d 854 (7th Cir. 1963); *United States v. Pardue*, 294 F. 543 (5th Cir. 1923). See generally 1 DAVIS TREATISE §§ 3.07-.09. But application of the immunity provision does not preclude the Commission from issuing a cease and desist order against persons so testifying, even though the order is based upon such testimony. *Drath v. FTC*, 239 F.2d 452 (D.C. Cir.), *cert. denied*, 353 U.S. 917 (1956).

³¹ See note 68 *infra*; *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."); *Coro, Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964). But see *Diamond Alkali Co., FTC Dkt. No. 8572*, 3 TRADE REG. REP. ¶ 18,078 (1967).

³² E.g., *Viviano Macaroni Co., FTC Dkt. No. 8666*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,467 (1966); cf. *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) (IRS); *CAB v. Air Transp. Ass'n of America*, 201 F. Supp. 318 (D.D.C. 1961). But cf. *Air Transp. Ass'n, CAB Dkt. No. 10281* [1960-1964 Transfer Binder] AV. L. REP. ¶ 21,355 (1963). See also *Miller, The Challenges to the Attorney-Client Privilege*, 49 VA. L. REV. 262 (1963).

³³ However, questions have been raised in recent years as to whether the attorney-client privilege should be applied to corporations. See *Radiant Burners, Inc. v. American Gas Ass'n*, 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963); *Jox, Attorney-Client Privilege—Its Application To A Corporate Client*, 3 WASHBURN L.J. 33 (1963); *Miller, supra* note 32.

³⁴ In *Knoll Assoc., Inc., FTC Dkt. No. 8549*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,668 (1966), the Commission found that documents allegedly stolen by one of respondent's disgruntled employees, in fact, only had been taken without authority. Hence, it held the exclusionary rule inapplicable. Agreeing that the facts did not raise a constitutional issue, Commissioner Elman nevertheless argued that the

stitutional command controlled Commission hearings. On the other hand, a court has held that the FTC need not honor a claim of accountant-client privilege which was not recognized at common law.³⁵

Definition of the scope of some evidentiary privileges, however, is affected by the agency context. Asserting privileges for trade secrets and sensitive business information has become the latest sport of respondents' and witnesses' attorneys and is the current vehicle for delay. Conversely, the disclosure of internal agency materials has particularly vexed the Commission in recent years.³⁶

complaint should have been dismissed because the apparent impropriety impaired the Commission's "obligation to maintain public confidence in the agency's processes and personnel." *Id.* at 22, 974. Earlier in the proceeding, in denying respondent's attempt to enjoin the Hearing Examiner from admitting the tainted documents into evidence, a federal district court came to the questionable conclusion that no illegal search and seizure had occurred, because the government had taken no part in the theft. *Knoll Assoc., Inc. v. Dixon*, 232 F. Supp. 283 (S.D.N.Y. 1964), *appeal dismissed pursuant to stipulation*, Case No. 29078 (2d Cir. June 9, 1965). *But cf. Elkins v. United States*, 364 U.S. 206 (1960). A second case involving the means utilized by the Commission in acquiring documents is now before the court. *Walmart Discount Corp. v. Dixon*, Civ. No. 2044-67 (D.D.C.), reported in CCH TRADE REG. REPORTS No. 322, at 3 (Aug. 28, 1967).

³⁵ *FTC v. St. Regis Paper Co.*, 304 F.2d 731 (7th Cir. 1962). While this case involved an attempt to protect information turned over to a trade association (of which respondent was a member) from production in response to an investigative subpoena, the rationale of the ruling appears equally applicable to agency hearings.

³⁶ Neither the FTC nor the courts have focused properly on what law governs the Commission's recognition or refusal of a testimonial privilege. Where the privilege is constitutionally required, the question is of no weight. But as to other privileges, Congress undoubtedly has the power to establish or bar testimonial privileges in agency proceedings.

The FTC Act is typical of agency enabling legislation and it makes no mention of whether privileged testimony or documents are immune to disclosure in hearings—or to compulsory process in investigations. (A recent exception is the Antitrust Civil Process Act which excludes privileged material from its disclosure requirements. 15 U.S.C. § 1312(c) (2) (1964). The only federal statute relating to privileged communications denies the marital communication privilege in some bankruptcy matters. Bankruptcy Act § 21(a), 11 U.S.C. § 44(a) (1964).) Professor Davis has made the provocative suggestion that § 7(c) of the Administrative Procedure Act, which provides that "any oral or documentary evidence may be received," is authority for agency rejection of unsound or questionable privileges. 2 DAVIS TREATISE § 14.08, at 287. It seems doubtful, however, that this provision reasonably can be interpreted as addressing itself to the question of testimonial privilege; rather, the legislative history suggests that its purpose was to avoid binding administrative agencies to technical rules of evidence. 92 CONG. REC. 2157, 5653 (1946); *see* ATTORNEY GENERAL, MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 76 (1947). Legislative omission, moreover, is seldom convincing support for deviation from common law practices. *See CAB v. Air Transp. Ass'n of America*, 201 F. Supp. 318 (D.D.C. 1961).

On the other hand, it seems clear that the Commission is empowered to recognize privileges at the hearing stage under its authority to adopt such rules as are necessary to implement the Act. FTC Act § 6(g), 15 U.S.C. § 46(g) (1964); *cf. Hunt Foods & Indus., Inc. v. FTC*, 286 F.2d 803 (9th Cir. 1960). As yet it has not done so. *See* FTC Rules § 3.43, 32 Fed. Reg. 8453 (1967). In addition, the FTC apparently never has considered whether recognition of a testimonial privilege not of constitutional dimensions is required. In a leading case concerning enforcement of an SEC subpoena, Judge Learned Hand explicitly assumed that agency proceedings are "subject to the same testimonial privileges as judicial proceedings. . . ." *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir.), *cert. denied*, 301 U.S. 684 (1937). Except for the Ninth Circuit, other courts have either made the same assumption or considered the matter a question of federal law. *E.g., Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *FTC v. St. Regis Paper Co.*, 304 F.2d 731 (7th Cir. 1962); *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953); *United States v. Threlkeld*, 241 F. Supp. 324 (W.D. Tenn. 1965); *In re Kearney*, 227 F. Supp. 174

Trade Secrets

Courts long have given protection to various types of confidential business information on the principle that intentionally inflicted harm is actionable unless privileged.³⁷ This protection has been extended not only against improper appropriation and disclosure by others, but also has included a qualified limitation on the testimonial duty of the possessor of secret information. As the economy has become more sophisticated and business more complex, the subjects which have been classified as trade secrets and entitled to protection have expanded.

Patentable inventions as well as those falling short of the statutory standards of novelty or inventiveness may be held as trade secrets. The technology associated with production—including plans, specifications, and general “know-how”—is frequently maintained as a trade secret. Non-technological internal business organization and operating methods may also be claimed as secrets, as may general methods of doing business, advertising campaigns, market research studies, and even lists of customers and suppliers. About the only type of subject matter which cannot be maintained as a secret is an abstract idea or general principle not embodied in a specific form or application.³⁸

(S.D.N.Y. 1964). *Contra*, *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); see *In re Bretto*, 231 F. Supp. 529 (D. Minn. 1964) (*Baird* applied pursuant to stipulation of the parties). Nevertheless, Congress' failure to act and the Commission's abstention arguably raises a choice of law problem which, under the Rules of Decision Act, requires the application of state law.

The laws of the several states, except where the Constitution . . . or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

28 U.S.C. § 1652 (1964). A perceptive student comment suggests, on the other hand, that the courts unwittingly may have adopted the appropriate solution, because the issue arises within a framework of federal law and such interstices have often been filled by case-made federal law. Comment, 31 U. CHI. L. REV. 395 (1964).

Where adoption of a state-recognized privilege will not frustrate a federal agency's program and a uniform approach is not essential, the courts should resort to state law to determine whether the privilege is required, until federal legislation or agency rules occupy the field. *Id.* Since the entire choice of law question and whether an agency must recognize a privilege can be avoided by the simple expedient of rule-making, amendment of the FTC rules before the omission becomes troublesome seems an appropriate solution. The FTC, however, need not adopt new rules setting forth specific boundaries within which various privileges will be recognized. For most privileges a simple statement, such as that confidential communications between an attorney and his client are privileged, should suffice—especially where there is no controversy.

³⁷ Note, 64 HARV. L. REV. 976 (1951). Under this theory, unauthorized disclosure is classified as a competitive tort of misappropriation or unfair competition. *Developments in the Law: Competitive Torts*, 77 HARV. L. REV. 888, 947 (1964). Trade secrets are also protected under concepts of property, contract, trust or confidence. See, e.g., property: *Peabody v. Norfolk*, 98 Mass. 452, 96 Am. Dec. 664 (1868); *Tabor v. Hoffman*, 118 N.Y. 30, 23 N.E. 12 (1889); contracts, trust or confidence: *Morison v. Moat*, 9 Hare 241, 255, 68 Eng. Rep. 492, 498 (1851); *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (dictum). See generally C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 1174 (1959).

³⁸ Doerfer, *The Limits on Trade Secret Law Imposed by Federal Patent and Antitrust Supremacy*, 80 HARV. L. REV. 1432, 1437 (1967) (citations omitted).

In one respect, the protection afforded trade secrets by injunctive actions to prevent wrongful disclosure is similar to the privilege applied to marital, physician-patient and attorney-client communications, since, in each of these situations, legal protection is given to the confidential relationship and the party who disclosed the information in confidence is entitled to demand that such confidence be maintained.³⁹ At the same time, the trade secret privilege is distinct from these other privileges and from actions protecting the secret itself, in that the privilege is not designed to protect the confidential relationship per se, but rather protects the "information" contained in the confidential communications from widespread dissemination.⁴⁰ The privilege, therefore, depends on the type of information that is sought to be withheld and the nature of the interests that will be affected if it is disclosed or withheld.

As a result, courts never have given absolute recognition to the trade secret privilege. If the trade secret is indispensable for ascertaining the facts in a lawsuit, the possessor of the secret (or one who has knowledge of it) will be compelled to reveal it.⁴¹ But "courts are loath to order disclosure of trade secrets absent a clear showing of an immediate need for the information requested."⁴² As with other privileges, this threshold showing applies whether the information is sought at trial or during discovery.⁴³ Moreover, once disclosure is deemed necessary, the court will usually impose conditions designed to limit the demanding party to use of the information only in the litigation and to prevent disclosure of the secret to non-party competitors or the public at large.⁴⁴

³⁹ See *E. I. Du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 102 (1917) (Holmes, J.); *C. McCormick*, *supra* note 27, chs. 9, 10, 11.

⁴⁰ See 8 J. WIGMORE, *supra* note 25, at § 2212(3).

⁴¹ What the state of the law actually is would be difficult to formulate precisely. It is clear that no absolute privilege for trade secrets is recognized. On the other hand, courts are apt not to require disclosure except in such cases and to such extent as may appear to be indispensable for the ascertainment of truth. More than this, in definition, can hardly be ventured. *Id.* at 156-57; see *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965).

⁴² 4 J. MOORE & B. GARFINKEL, *FEDERAL PRACTICE* ¶ 26.22[3], at 1290 (2d ed. 1966).

⁴³ *FED. R. CIV. P.* 30(b), 31(d), 33, 34; see *United States v. American Optical Co.*, 39 F.R.D. 580 (N.D. Cal. 1966). See generally Annot., 17 A.L.R.2d 383 (1951).

⁴⁴ See generally Annot., 62 A.L.R.2d 509 (1958). The justification for resort to *in camera* procedure was first explained in *Scott v. Scott* [1913] A.C. 417, 437-38: [I]t may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration.

As one would expect, the techniques by which protection has been provided vary as much as the subjects given protection. One device commonly used sacrifices the principle of public hearings and prohibits public disclosure by taking trade secret evidence in private session, or "*in camera*."⁴⁵ Continuing secrecy is assured by sealing the record, limiting use of such evidence by the parties and the court, and imposing a duty of continuing secrecy on the part of those participating in the *in camera* proceeding.⁴⁶ Disclosure often has been limited to counsel and those assisting him.⁴⁷ Where the data is to be evaluated by experts or used for comparative purposes, disclosure may be limited to disinterested experts and once the comparisons are made, the results, but not the underlying data, will be revealed.⁴⁸ In addition, the data may be disguised to prevent recognition of the source of particular information.⁴⁹

Despite the scope and variety of these protective devices, courts have been less than sanguine concerning their effectiveness in limiting public disclosure of trade secrets. As the late Judge Dawson colorfully pointed out in an antitrust merger proceeding, the effect of even "protected disclosure" is that everybody in the industry "takes their clothes off and nothing is secret anymore."⁵⁰ Nonetheless, disclosure rather than protection is the rule because of the overriding interest requiring that each party be empowered to obtain all evidence needed to prove his case. Undoubtedly contributing to this judicial liberality, despite much skepticism, is the view once expressed by Mr. Justice Cardozo that "[b]usiness men as a rule are not wholly in the dark as to the ways of their competitors."⁵¹ Hence, the injury resulting from disclosure, on balance, often is thought to be more imagined than real.

⁴⁵ See, e.g., *Ferment Acid Corp. v. Miles Laboratories, Inc.*, 338 F.2d 586 (7th Cir. 1964); *Masland v. E. I. Du Pont de Nemours Powder Co.*, 224 F. 689 (3d Cir. 1915), *rev'd on other grounds*, 244 U.S. 100 (1917); *A. O. Smith Corp. v. Petroleum Iron Works Co.*, 73 F.2d 531 (6th Cir. 1934). In the first case which appears to have adopted this procedure, *Badische Anilin und Soda Fabrik v. Levenstein*, 24 Ch. D. 156 (1883), the court excluded court reporters as well as the public and received the evidence *in camera* with only the court, the parties and their expert witnesses present.

⁴⁶ See, e.g., *A. O. Smith Corp. v. Petroleum Iron Works Co.*, 73 F.2d 531 (6th Cir. 1934); *Julius M. Ames Co. v. Bostitch, Inc.*, 235 F. Supp. 856 (S.D.N.Y. 1964); *State ex rel. Ampco Metal, Inc. v. O'Neill*, 273 Wis. 530, 78 N.W.2d 921 (1956).

⁴⁷ See, e.g., *Cone Mills Corp. v. Joseph Bancroft & Sons, Co.*, 33 F.R.D. 318 (D. Del. 1963); *United States v. Lever Bros. Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961).

⁴⁸ See, e.g., *Cities Serv. Oil Co. v. Celanese Corp. of America*, 10 F.R.D. 458 (D. Del. 1950).

⁴⁹ See, e.g., *Empire Rayon Yarn Co. v. American Viscose Corp.*, 160 F. Supp. 334 (S.D.N.Y. 1958).

⁵⁰ Transcript of Pre-Trial Hearing at 30, *United States v. Lever Bros. Co.*, 193 F. Supp. 254 (S.D.N.Y. 1961), quoted in Brief for Respondent at 9, *Crown Cork & Seal Co.*, FTC Dkt. No. 8687 (Dec. 14, 1966).

⁵¹ *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 323 (1933).

The Federal Trade Commission's position regarding trade secrets is an ambiguous and often curious mixture of substantive protection and procedural denial. In connection with the Commission's substantive support of trade secrets, section 5(a)(1) of the FTC Act declares "[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce" unlawful.⁵² Early in its history, the Commission viewed this provision as a mandate to prohibit the use of espionage, bribing of employees or similar means to procure a competitor's secrets.⁵³ Inducing employees of competitors to violate their employment contracts or enticing them away in such numbers or under such circumstances as to hamper a competitor's business also was declared unlawful.⁵⁴ Except in connection with the issuance of trade practice rules,⁵⁵ however, the Commission's affirmative protection of trade secrets has been narrowly confined, because the Commission's jurisdiction applies only to activities in interstate commerce and to actions which are "in the interest of the public";⁵⁶ trade secret violations, in other words, are seldom serious enough to warrant Commission intervention. As a result, the private law of unfair competition has continued to develop independent of the FTC.⁵⁷

On the procedural side, Congress has placed no restrictions on the Commission's evidentiary treatment of trade secrets.⁵⁸ The FTC Act, for example, does not indicate whether the Commission need recognize a trade secret privilege.⁵⁹ Section 6(f) prohibits Commission disclosure of "trade secrets and names of customers" in its published

⁵² 15 U.S.C. § 45(a)(1) (1964).

⁵³ *T. C. Hurst v. FTC*, 268 F. 874 (E.D. Va. 1920); *California Packing Corp.*, 25 F.T.C. 379 (1937); *FTC v. Oakes Co.*, 3 F.T.C. 36 (1920); *FTC v. American Agricultural Chem. Co.*, 1 F.T.C. 226 (1918); *Botsford Lumber Co.*, 1 F.T.C. 60, 87 (1918); see Note, 28 COLUM. L. REV. 799 (1928). Curiously, the Commission, itself, was found guilty of a similar practice under the guise of an official proceeding when, in one of its initial proceedings, it sought information concerning the production of "Syndolag" (a patented article used to repair the bottoms of open hearth steel furnaces) for use by the Navy Department. *United States v. Basic Prods. Co.*, 260 F. 472 (W.D. Pa. 1919).

⁵⁴ *Cook-Master, Inc.*, 46 F.T.C. 532 (1950); *Darling & Co.*, 30 F.T.C. 739 (1940); *Standard Car Equip. Co.*, 1 F.T.C. 144 (1918).

⁵⁵ See, e.g., *Trade Practice Rules for Commercial Dental Laboratory Industry*, 16 C.F.R. § 18.6 (1967) (enticing away employees of competitors); *Trade Practice Rules for Gummed Paper and Sealing Tape Industry*, 16 C.F.R. § 19.12 (1967) (procurement of competitors' confidential information).

⁵⁶ *FTC v. Klesner*, 280 U.S. 19, 28 (1929); *Winslow v. FTC*, 277 F. 206 (4th Cir. 1921); *New Jersey Asbestos Co. v. FTC*, 264 F. 509 (2d Cir. 1920); Note, 45 HARV. L. REV. 1248, 1251 (1932); see *Hernard Mfg. Co.*, 49 F.T.C. 1560 (1952).

⁵⁷ See *Handler, Unfair Competition and The Federal Trade Commission*, 8 GEO. WASH. L. REV. 399, 409 (1940); Klein, *The Technical Trade Secret Quadrangle: A Survey*, 55 NW. U.L. REV. 437 (1960).

⁵⁸ Although it has never been directly ruled upon, one court has indicated that fairness requirements prevent uncontrolled disclosure of trade secrets in FTC hearings. *See Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020, 1023 (D.D.C. 1963); cf. *FCC v. Schreiber*, 381 U.S. 279, 296-98 (1965).

⁵⁹ See note 36 *supra*.

reports,⁶⁰ but this admonition does not govern adjudicative hearings.⁶¹ Newly-enacted section 3 of the Administrative Procedure Act (the so-called "Freedom of Information Act") *exempts* from its disclosure requirements "trade secrets and commercial or financial information,"⁶² but it specifies no affirmative agency obligation in the handling of trade secrets in adjudicative proceedings.⁶³ The Commission's rules also make no provision for any trade secret privilege at hearings.⁶⁴ Its decisions, therefore, must be the starting point for any analysis.⁶⁵

Early FTC practice used denial of the trade secret privilege, in effect, as an enforcement device in unfair trade practice cases. In *FTC v. Clarke*,⁶⁶ the first case disputing reliance on the privilege, a respondent charged with deceptive advertising declined to reveal the exact ingredient proportions of his "blood building tablets." On the Commission's application to require respondent to answer, the court

⁶⁰ 15 U.S.C. § 46(f) (1964). Section 10 of the FTC Act also prohibits any FTC officer or employee from making public, without authority, information obtained by the FTC. 15 U.S.C. § 50 (1964). This provision is now duplicated for all federal government employees. 18 U.S.C. § 1905 (1964).

⁶¹ *FTC v. Tuttle*, 244 F.2d 605, 616 (2d Cir.), *cert. denied*, 354 U.S. 925 (1957).

⁶² 5 U.S.C.A. § 552(b)(4) (Supp. II 1967). The original provision in § 3(c) of the Administrative Procedure Act affirmatively gave agencies the authority to keep information "confidential for good cause shown," 60 Stat. 237 (1946); but it, too, did not govern adjudicative proceedings. *But cf.* *Graher Mfg. Co. v. Dixon*, 223 F. Supp. 1020, 1022 (D.D.C. 1963).

⁶³ See generally Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 787-92 (1967); Note, 56 GEO. L.J. 18 (1967); Note, 40 NOTRE DAME LAW. 417 (1965).

⁶⁴ FTC rules, however, do specify that hearings shall be public, that transcripts are available upon payment of a standard fee and that *in camera* hearings or procedures may be adopted only in exceptional cases for good cause. FTC Rules §§ 3.41(a), 32 Fed. Reg. 8452 (1967); 3.44(a), *id.* at 8453; 3.45(b), *id.* at 8454.

⁶⁵ Since rulings by FTC examiners are not readily available, it only can be assumed that examiners adhere to these Commission opinions. The FTC still must take many steps to implement fully the policies set by Congress in the recent amendment of § 3 of the Administrative Procedure Act. The FTC does not publish its official reports until almost four years after a case is decided, and hearing examiner decisions and FTC rulings on interlocutory appeals—both of critical importance when attempting to ascertain FTC practice and policy on procedural or evidentiary questions—are not fully reported anywhere. See, e.g., *Crown Cork & Seal Co.*, FTC Dkt. No. 8687 (Comm'n Opinion April 10, 1967) (3-2 opinion on treatment of sensitive information demanded of third parties) (summarized briefly only in BNA, *ANTI-TRUST & TRADE REG. REP.* No. 301, at A-22 (April 18, 1967)); *Uarco, Inc.*, 58 F.T.C. 1168 (1961) (official report does not include order ruling on motion to remove documents from public record reported in [1961-1963 Transfer Binder] *TRADE REG. REP.* ¶15,423 (FTC 1961)); *Sun Oil Co.*, FTC Dkt. No. 6934 (Comm'n Opinion Sept. 15, 1958) (interlocutory opinion adopting the rule of the *Jencks* case in FTC hearings apparently never reported in either official or unofficial reports or services). Not only are FTC reports incomplete and published late, but the subject index of those decisions published is wholly unsatisfactory. Cf. Newman, *Government and Ignorance—A Progress Report on Publications of Federal Regulations*, 63 HARV. L. REV. 929 (1950). The index requirement imposed by amended § 3 of the Administrative Procedure Act is, on the other hand, limited to agency matters adopted or issued after July 4, 1967. 5 U.S.C.A. § 552(a)(2) (Supp. II 1967). See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 781-82 (1967).

⁶⁶ 33 F.T.C. 1812 (S.D. Cal. 1941).

ruled the question material and necessary to ascertain the facts. According to the court, the privilege was narrower in FTC proceedings because more than private parties and rights were involved. Hence, upon respondent's continued refusal to reveal his product's chemical composition, he was held in contempt of court⁶⁷ and imprisoned. Such FTC reliance on judicial sanctions to enforce a respondent's testimonial duty causes needless delay and seems unwarranted, since the FTC can only order a respondent to cease an unlawful practice and, upon failure to observe such an order, can impose only civil and not criminal liability.⁶⁸ In no other case has the Commission felt compelled to seek this remedy. Moreover, in this particular case, respondent's answer—and possible revelation of a trade secret—was not even "necessary." The FTC, by reliance on expert witnesses, already had demonstrated that the product lacked any "blood building effects"; thus the examiner could have avoided the problem by ruling that the burden of going forward⁶⁹ (and along with it the need to disclose the exact ingredients) had shifted to respondent.

Subsequent Commission cases have utilized this technique of transferring the burden of going forward. Thus, in *Charles of the Ritz Distributors Corp. v. FTC*,⁷⁰ a cosmetic firm charged with misrepresenting the therapeutic effect of its "Rejuvenescence" foundation cream was not privileged

to stand upon its refusal to disclose the true formula of its preparation as a trade secret . . . ; and its failure to introduce evidence thus within its immediate knowledge and control, if existing anywhere, of the rejuvenating constituents and therapeutic effect of its preparation is strong confirmation of the Commission's charges.⁷¹

In *Evis Manufacturing Co. v. FTC*,⁷² on the other hand, the court overruled the Commission's reliance on respondent's silence as evidence that the product would not perform as claimed. The court

⁶⁷ See *Clarke v. FTC*, 128 F.2d 542 (9th Cir. 1942).

⁶⁸ Clayton Act § 11(1), 15 U.S.C. § 21(1) (1964); FTC Act § 5(1), 15 U.S.C. § 45(1) (1964); see 15 U.S.C. § 56 (1964). See also note 31 *supra*.

⁶⁹ For an analysis of the burden of persuasion in the law of evidence, see C. McCORMICK, *supra* note 27, § 306; J. THAYER, *EVIDENCE* 357-59 (1898). See UNIFORM RULE OF EVIDENCE 1(4).

⁷⁰ 143 F.2d 676 (2d Cir. 1944).

⁷¹ *Id.* at 679.

⁷² 55 F.T.C. 1483 (1959), *rev'd*, 287 F.2d 831 (9th Cir.), *cert. denied*, 368 U.S. 824 (1961) (refusal to disclose composition and processing of metal in respondent's water conditioner). This case represents an unhappy chapter in FTC practice and warns that serious consequences may follow adjudicative hearings, even though no order results. "[R]espondent's case was twice dismissed by the hearing examiner who was twice reversed by the Commission. On appeal the respondent finally prevailed. But the adverse publicity and the drain on company finances for the litigation put it out of business." Farley & Farley, *An American Ombudsman: Due Process in the Administrative State*, 16 *Ad. L. Rev.* 212, 213 n.5 (1964).

distinguished *Evis* from *Ritz* on the grounds that in *Evis* (1) satisfied user testimony contradicted expert testimony that respondent's product was falsely advertised, and (2) a patent application was pending for the process which justified respondent's strenuous claim of a trade secret.

Several problems inherent in the technique of transferring the burden of going forward are apparent: it fails to focus on the type of protection respondent's trade secret should have; nor is it flexible enough to account for different degrees of secrecy; and under this approach trade secrets are entitled either to total protection or to none at all—the trade secret privilege cannot receive varying degrees of protection, as is true elsewhere.⁷³ Furthermore, respondent's reliance on satisfied user testimony to answer Commission experts will usually not be sufficient rebuttal, despite the *Evis* decision.⁷⁴ Thus, under the transfer theory, a respondent relies on the privilege only at the risk that, if it is denied, such reliance may constitute sufficient evidence to support a finding of unlawful practices. This burden seems unreasonably heavy. In any case, the transfer of the burden of going forward approach would seem to be limited to assertions of trade secrets by respondents; it can have no relevance in determining whether to recognize a witness' trade secret claim.

Not surprisingly, the first reported recognition of *in camera* proceedings in an FTC hearing involved a trade secret claim by a non-party witness. In *Segal Lock & Hardware Co. v. FTC*,⁷⁵ the Second Circuit had to determine whether respondent was denied a fair hearing by an *in camera* demonstration by two witnesses (before a hearing examiner and without counsel present) of how respondent's supposedly pick-proof lock could be picked. The court ruled that this secret session did not deny respondent's right of cross-examination, since under the Commission's broad, yet proper, definition of a "pick-proof" lock (that is, one which could not be opened without a key or damage to the lock), the issue was not how the lock was picked by the witness, but rather whether the lock could be opened. It seems questionable, however, whether the court was properly solicitous of respondent's interests when it upheld the exclusion of counsel from the demonstration; ⁷⁶ absent a channel for public scrutiny, the examiner, while trying, is no longer himself "under trial."⁷⁷ More significant for purposes of

⁷³ See 8 J. WIGMORE, *supra* note 25, § 2212(3).

⁷⁴ See, e.g., *Basic Books, Inc. v. FTC*, 276 F.2d 718, 720-21 (7th Cir. 1960); *Royal Constr. Co., FTC Dkt. No. 8690*, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,772 (1966).

⁷⁵ 143 F.2d 935, 937 (2d Cir. 1944), *cert. denied*, 323 U.S. 791 (1945).

⁷⁶ See FTC Rules § 3.41(c), 32 Fed. Reg. 8453 (1967); Administrative Procedure Act § 6(a), 5 U.S.C.A. § 555(b) (Supp. II 1967). See also *Gideon v. Wainwright*, 372 U.S. 335 (1963); DAVIS, TREATISE § 8.10.

⁷⁷ See text accompanying note 13 *supra*.

this analysis is the court's brief but explicit approval of *in camera* FTC proceedings to protect compelled testimony relating to trade secrets.

Following this seemingly blanket judicial approval of *in camera* proceedings, FTC examiners readily authorized private sessions for receiving confidential information.⁷⁸ The Commission appeared to have adopted, without modification, judicial standards for recognizing the trade secret privilege.⁷⁹ Examiners were encouraged to seek agreement by the parties on confidential treatment.⁸⁰ Some courts, moreover, seemed to be suggesting that the burden was on the Commission to prove the propriety of public hearings when the privilege was asserted.⁸¹

Thus, in the leading case of *H. P. Hood & Sons, Inc.*,⁸² the hearing examiner, "upon motion of counsel for respondent and upon his own initiative,"⁸³ ordered that sales and pricing documents (apparently obtained from respondent and offered by complaint counsel)

⁷⁸ Hood, 58 F.T.C. at 1185; Dixon, *Recent Developments in Federal Trade Commission Enforcement*, 18 A.B.A. ANTITRUST SECTION 107, 116 (1961) ("[T]he selective withholding of exhibits from the public record has been the practice in our adjudicative hearings for many years."); see Uarco, Inc., 58 F.T.C. 1168 (1961) (tabulations of respondent's net sales in recent years classified by customer and by type—i.e., below cost groupings).

⁷⁹ That there is some privilege in the matter of divulging "trade secrets" is well settled. This privilege extends, not merely to the chemical and physical composition of substances employed and to the mechanical structure of tools and machines, but also to such other facts of a possibly private nature as the names of customers, the subjects and amounts of expense and the like. Wigmore on Evidence, 3rd edition Volume 8 Section 2212.

The privilege is not an absolute one. Nor can the "public interest" be automatically held up as an excuse for denying it, although it is always an important consideration.

Maico Co., 51 F.T.C. 1197, 1202 (1955) (witnesses not required to disclose names of customers or dollar amount of sales to each); cf. Pure Oil Co., 57 F.T.C. 1542, 1542-43 (1960): The examiner was instructed

to determine whether there are practicable alternative means available to the respondent to establish the ultimate facts it wishes to prove . . . , and if not, to take appropriate steps, . . . to protect such witnesses against unnecessary disclosure of private business information and, where such disclosure is necessary, to impose suitable conditions of confidentiality.

⁸⁰ Maico Co., 51 F.T.C. at 1203.

⁸¹ See *FTC v. Bowman*, 149 F. Supp. 624, 630-31 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957) (business records of nonparty witness' production, sales, purchases, patent agreements, prices and suppliers entitled to confidential treatment); *FTC v. Menzies*, 145 F. Supp. 164, 171 (D. Md. 1956), *aff'd*, 242 F.2d 81 (4th Cir.), *cert. denied*, 353 U.S. 957 (1957) (business records of sales to customers by respondent in three metropolitan areas during recent 18-month period viewed as business secrets entitled to confidential treatment).

⁸² 58 F.T.C. 1184 (1961).

⁸³ Although two law review commentaries on *Hood* disagreed as to who requested the *in camera* treatment, compare 60 MICH. L. REV. 647 (1962), with 46 MINN. L. REV. 778 (1962), the Commission's opinion indicates that some were suggested by respondent's counsel and others by the examiner. Hood, 58 F.T.C. at 1184. In addition, although the Michigan comment concludes that the FTC would treat manufacturing processes and customer lists identically, the Commission's opinion sets forth different tests for according confidential treatment to these items. *Id.* at 1188-89. See text accompanying notes 87-88 *infra*.

be placed in evidence *in camera*. Upon complaint counsel's appeal, the FTC called a halt to such broad secrecy and re-examined the treatment of sensitive information at the hearing stage. Since the Commission's recently adopted Rules of Practice incorporate this decision by reference,⁸⁴ it deserves extended consideration.

Recognizing the desirability of insuring that full meaning be given to its "public" hearing standard, the Commission sharply restricted those situations in which evidence would be received *in camera*. First, it overruled the examiner's decision that the proponent of public treatment shoulders the burden of persuasion,⁸⁵ holding that the burden of showing good cause for confidential treatment rests on the party requesting an *in camera* order.⁸⁶ Second, the Commission held that this burden is satisfied only by demonstrating that public disclosure would result in "clearly defined, *serious injury* to the person or corporation whose records are involved."⁸⁷ Traditional trade secrets, such as secret formulae, research and manufacturing processes, presumptively meet the good cause requirement and normally would not require a further showing of severe economic injury. On the other hand, business records, such as customer lists, prices, business costs and profits, would not merit the same degree of protection, and would be sealed only "in exceptional circumstances upon a clear showing that an *irreparable injury* will result from disclosure."⁸⁸ It is not clear, however, whether this latter requirement of "irreparable harm" is meant as a modification of the generally applicable "serious injury" definition of good cause. The opinion does not attempt to resolve this ambiguity and indicates only that "serious injury" is something more detrimental than mere embarrassment, a business desire to keep information confidential or exposure to possible treble-damage actions for antitrust violations.⁸⁹ Nor is the content of, or distinction between, these terms

⁸⁴ FTC Rules § 3.45(b), 32 Fed. Reg. 8454 (1967).

⁸⁵ "Neither party need show cause why evidence should be placed in the public record since such placement is mandatory unless excused." Hood, 58 F.T.C. at 1188; accord, FTC Rule § 3.41(a), 32 Fed. Reg. 8452 (1967).

⁸⁶ In the case of data obtained from nonparties the Commission makes no provision for notice to such nonparties that information they supplied will appear on the public record. Cf. FTC Rules §§ 3.45(c), 4.11, 32 Fed. Reg. 8454 (1967). However, if documents were secured by *either* party "upon the express condition that they would be placed *'in camera'*, there is no room for the exercise of any rule since good faith would demand that the condition be kept." Hood, 58 F.T.C. at 1190. *But cf.* Carnation Co., 52 F.T.C. 998, 1000 (1956). It is doubtful whether this reference in Hood applies beyond the specific documents involved there, since the Commission otherwise would no longer control *in camera* treatment of documents obtained by respondent from third persons.

⁸⁷ Hood, 58 F.T.C. at 1188 (emphasis added). Compare the FTC's definition of "good cause" when the confidentiality of government documents are at stake. *E.g.*, L. G. Balfour Co., FTC Dkt. No. 8435, 62 F.T.C. 1541, 1545-46 (1963).

⁸⁸ Hood, 58 F.T.C. at 1189 (emphasis added).

⁸⁹ *Id.* at 1189-90; see Publicity in Taking Evidence Act, 15 U.S.C. § 30 (1964) (evidence taken by deposition in Sherman Act injunction proceeding shall be open to the public).

suggested by examining the Commission's stated objectives in restricting *in camera* evidence. Rather, the opposite seems to be true, for none of the several reasons put forward by the Commission in *Hood*⁹⁰ supports a distinction between the treatment of "trade secrets" and "business information." In fact, the asserted justifications do not support strict limitations on any confidential treatment.

First, the Commission suggested that public hearings and, *ipso facto*, revelation of sensitive business information, have a greater deterrent effect on potential violators than do hearings where such data are generously granted confidential status. But, to utilize public hearings and to reveal trade secrets for such *in terrorem* purposes is grossly inappropriate. Rather, confidential treatment of sensitive business information is necessary, at least until respondent has been adjudged guilty of an unlawful practice, if respondent's right to a fair hearing is not to be impaired.⁹¹ Second, a public record was asserted to be necessary to guide those advising businessmen who seek to comply with the law and to enable the public to familiarize itself with all aspects of FTC hearings.⁹² "Problems such as the formulation of an adequate cost justification defense or the erection of a statistical rebuttal to an inference of adverse competitive effect can only be solved by access to the evidence in past cases."⁹³ But this argument exceeds its foundation. In addition to the fact that, as a practical matter, Commission records are inaccessible,⁹⁴ revelation of names of customers or specific

⁹⁰ 58 F.T.C. at 1186-87.

⁹¹ An analogy from criminal procedure is instructive here. (For the relevance of fairness requirements developed in criminal cases to administrative proceedings, see the application of *Jencks v. United States*, 353 U.S. 657 (1957), to administrative agencies, note 149 *infra* and accompanying text.) The use of similar *in terrorem* techniques to restrict an accused's exercise of his constitutional rights has been condemned. For example, it has been held that the possible imposition on a criminal defendant of a harsher sentence upon retrial and conviction for the same offense (following reversal of the first sentence because of constitutional error) is an unconstitutional condition on his right to a fair trial. See *Patton v. North Carolina*, 381 F.2d 636 (4th Cir. 1967), *cert. denied*, 36 U.S.L.W. 3295 (U.S. Jan. 23, 1968); *Marano v. United States*, 374 F.2d 583 (1st Cir. 1967). *Contra*, *United States ex rel. Starner v. Russell*, 378 F.2d 808 (3d Cir.), *cert. denied*, 88 S. Ct. 166 (1967); *Newman v. Rodriguez*, 375 F.2d 712 (10th Cir. 1967); *United States v. White*, 382 F.2d 445 (7th Cir. 1967). See generally Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965). Similarly, the Commission's policy, as justified, seems to be an improper attempt to deter respondent and potential respondents, by threat of indiscriminate disclosure of its business secrets, from using his right to present his case at a fair hearing. See also *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020, 1022 (D.D.C. 1963).

⁹² As further justification, Chairman Dixon has also suggested that, without substantially public records, a legislative committee's attempt to evaluate the FTC's enforcement program would be like "working in a vacuum." Dixon, *supra* note 78. However, just how the sealing of sales and pricing data in the *Hood* case, for example, would frustrate legislative review was not spelled out.

⁹³ *Hood*, 58 F.T.C. at 1186.

⁹⁴ See note 65 *supra*. Even those Washington law firms involved almost daily in FTC hearings find it virtually impossible to use FTC records. See, e.g., Brief

sales and profit figures, for example, adds nothing in terms of guidance to a respondent otherwise faced with a complete, but less specific, non-confidential record. Disclosure of sensitive business information would be of little help here. Rather, the methodology of establishing a cost justification defense needs to be properly explained by the Commission.⁹⁵ The third justification seems equally defective. Proceedings often require disclosure of confidential data from competitors as well as respondent. Since the parties (including respondent) may examine the evidence, the Commission concluded that wholesale *in camera* treatment of sensitive information unfairly advantages respondent, who is likely a lawbreaker; if confidential treatment is allowed, respondent is apprised of its competitors' material, but similar data from respondent and other competitors is hidden from respondent's competitors.⁹⁶ But the proper response to this potential injury to respondent's competitors is not to increase the injury to such competitors by exposure of information to all other competitors as well as to respondent; nor should the Commission increase respondent's injuries by broad disclosure of its sensitive information. Rather, it would be fairer and wiser to impose careful limitations on respondent's access to or use of confidential information.⁹⁷

The Commission formula is also open to other questions. Is the distinction between "serious injury" and "irreparable harm" one of permanence, of severity or of something else?⁹⁸ Is not the lack of a presumption of serious injury from revelation of business records and the requirement that the party seeking *in camera* treatment carry the burden of persuasion a hurdle sufficient to insure that needless secrecy

of Respondent at 6, H. P. Hood & Sons, Inc., FTC Dkt. No. 7709 (filed before Hearing Examiner Jan. 28, 1960):

Unfortunately, there is no digest of all rulings of FTC examiners on requests for more definite statements—at least none that is available to counsel for respondent. The examples given above are simply matters that have come to the attention of counsel in this case and some involved cases handled by the law firm representing respondent in the instant case. Consequently, the citation of isolated cases to the contrary that may be known to counsel in support of a complaint can hardly demonstrate a lack of power on the part of the Hearing Examiner.

The author, having spent several days attempting to review Commission files on confidentiality cases, can attest to the unrealistic nature of the Commission's available records argument.

⁹⁵ *FTC v. Standard Motor Prods., Inc.*, 371 F.2d 613, 619-20, 622 (2d Cir. 1967).

⁹⁶ Relying on § 5(b) of the FTC Act, a competitor could seek to intervene in the proceedings as a third party and thus obtain the confidential information. 15 U.S.C. § 45(b) (1964); see FTC Rules § 3.14, 32 Fed. Reg. 8450 (1967). But intervention is not of right and rests in the Commission's discretion "upon good cause shown." Moreover, it has seldom, if ever, been used. See, e.g., *L. G. Balfour Co.*, FTC Dkt. No. 8435, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,793 (1966); *Berger Watch Co.*, 56 F.T.C. 1655 (1959). But see *Florida Citrus Mutual*, 53 F.T.C. 973, 975 (1957); cf. *L. G. Balfour Co.*, FTC Dkt. No. 8435 (Dec. 27, 1967).

⁹⁷ See, e.g., text accompanying notes 46-47 *supra*.

⁹⁸ 46 MINN. L. REV. 778, 783 (1962).

will be avoided?⁹⁹ What of the potential cost to the Commission (and hence to the public) of non-confidential treatment: will business refuse to supply such information willingly, thereby increasing the need to utilize compulsory process?¹⁰⁰ And has sufficient consideration been given to alternatives by which adequate protection of confidential data could be assured while maintaining a complete record? Before considering any alternative, however, the Commission's actual experience under the *Hood* rule should be reviewed for answers to these questions.

The reported cases decided since *Hood* dealing with confidential information at the hearing stage demonstrate that the FTC has made substantial strides in protecting the rule of public hearings from *in camera* erosion.¹⁰¹ All of these cases involved the confidentiality of sales and pricing data; apparently examiners either seldom face questions of traditional trade secrets or these decisions are not questioned by either party. On the other hand, despite a contrary classification in *Hood*,¹⁰² current overall or branch sales,¹⁰³ sales per customer,¹⁰⁴ prices¹⁰⁵ and profit or loss statements¹⁰⁶ in practice have been granted presumptive *in camera* treatment. The definition of *current*

⁹⁹ *Id.* at 784-85.

¹⁰⁰ 60 MICH. L. REV. 647, 650 (1962); BNA, ANTITRUST & TRADE REG. REP. No. 20, B-3 (Nov. 28, 1961). Although the Commission does not appear to have been unduly hampered by lack of business cooperation in the past six years, this may be attributable to a failure to enforce the *Hood* formula, rather than to its wisdom. See note 109 *infra* and accompanying text.

¹⁰¹ See *Diamond Alkali Co.*, FTC Dkt. No. 8572 (Hearing Examiner Order Aug. 30, 1963) (denying motion for confidential treatment of subpoenaed information, and noting that, if a clear showing of irreparable injury is demonstrated, information offered in evidence will be received *in camera*); *H. P. Hood & Sons, Inc.*, FTC Dkt. No. 7709 (Hearing Examiner Order June 8, 1961), *interlocutory appeal denied*, (Comm'n Order July 21, 1961); *Sperry Rand Corp.*, FTC Dkt. No. 7559, [1961-1963 Transfer Binder] TRADE REG. REP. ¶15,468 (Hearing Examiner Order 1961), *permission to file interlocutory appeal denied*, [1961-1963 Transfer Binder] TRADE REG. REP. ¶15,569 (1961).

The Commission, however, does not apply the *Hood* rule to discovery proceedings, since data secured in this manner are not yet placed on the public record. *National Dairy Prods. Corp.*, FTC Dkt. No. 8548, [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,778 (1964) (information obtained by subpoena). *Contra*, *Topps Chewing Gum, Inc.*, FTC Dkt. No. 8463, [1963-1965 Transfer Binder] TRADE REG. REP. ¶16,438 (Hearing Examiner Order 1963) (transcript of deposition taken with aid of FTC subpoena).

¹⁰² See text accompanying note 88 *supra*.

¹⁰³ *H. P. Hood & Sons, Inc.*, FTC Dkt. No. 7709 (Hearing Examiner Order June 8, 1961) (privately held corporation); see *Crown Cork & Seal Co.*, FTC Dkt. No. 8687 (Comm'n Opinion June 26, 1967) (approving in dictum examiner's ruling reserving his decision as to current sales data); *National Tea Co.*, FTC Dkt. No. 7453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,463, at 22,699 (1966). But see *Columbia Broadcasting System, Inc.*, FTC Dkt. No. 8512, 3 TRADE REG. REP. ¶18,037, at 20,459 (1967).

¹⁰⁴ See *Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963).

¹⁰⁵ See *id.*; *National Tea Co.*, FTC Dkt. No. 7453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,463, at 22,699 (1966).

¹⁰⁶ *H. P. Hood & Sons, Inc.*, FTC Dkt. No. 7709 (Hearing Examiner Order June 8, 1961); *National Tea Co.*, FTC Dkt. No. 7453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,463, at 22,699 (1966).

financial data deserving confidential protection, however, has not been treated consistently. In one case, sales data ranging in age from two and one-half to six and one-half years were denied *in camera* protection, even though submitted by a nonparty witness whose request for confidentiality was not opposed by either party.¹⁰⁷ In another case, the Commission did not disturb an examiner's confidential treatment of seven-year-old price and sales figures.¹⁰⁸ But it seems clear that, despite constant reiteration by the FTC that the *Hood* rule controls, the Commission has followed the lead of a federal district court in dropping the "irreparable injury" test for ordinary business records.¹⁰⁹ Instead, the test now applied by the Commission to requests for confidential protection of business records and trade secrets is whether public disclosure will cause a "clearly defined, serious injury." And, as noted above, where such records are current, serious injury is readily found.

Despite the correctness of most Commission decisions concerning confidential treatment of sensitive information at the hearing stage,

¹⁰⁷ Crown Cork & Seal Co., FTC Dkt. No. 8687 (Comm'n Opinion June 26, 1967).

¹⁰⁸ National Tea Co., FTC Dkt. No. 7453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,463, at 22,699 (1966). The Commission's action in Columbia Broadcasting System, Inc., FTC Dkt. No. 8512, 3 TRADE REG. REP. ¶ 18,037, at 20,459 (1967), provides a vivid contrast. On reviewing the merits there, the FTC commented, although the opinion does not indicate that either party raised the issue, on the impropriety of *in camera* orders regarding past sales data and record club membership figures of respondent and nonparty witnesses.

¹⁰⁹ In Graber Mfg. Co. v. Dixon, 223 F. Supp. 1020 (D.D.C. 1963), plaintiff, in its affidavit, contended that an exhibit estimating its net dollar volume sales to a major customer for 1961 should be received *in camera* because accurate information as to a competitors [*sic*] success or failure with a particular product, or in a particular market area may save untold dollars in research, development, and marketing, and allow a direct benefit from the expense and experience of the competitor. Information as to a competitors [*sic*] declining sales or financial strength, or the number of service and repair personnel in an area, is a potent weapon in diverting customers to one's own product or service.

Id. at 1022. Complaint counsel conceded the need for confidential treatment of sales figures, but asserted that plaintiff need not be so secretive as to four years of previous sales. (How this period was arrived at seems unexplainable; the net sales were estimated here because 1961 was the current year at the time of the hearings.) The examiner felt bound by the *Hood* irreparable injury rule for business records, even though competitors would seek this information. The court pointed out, however, that "proof of irreparable injury, which would be difficult under any circumstances concerning competitive use of business information, may be next to impossible before the Commission." *Id.* at 1022-23. Since plaintiff had shown a "clearly defined and serious injury" to his business, the court held that it had "good cause" for keeping the information confidential.

In Crown Cork & Seal Co., FTC Dkt. No. 8687 (Comm'n Opinion June 26, 1967), the Commission refused to grant *in camera* status to old, or at least aging, sales data (*i.e.*, ordinary business records) because the nonparty witnesses had not demonstrated how "exposure even to the prying eyes of competitors will result in the clearly defined and serious injury required by the criteria set forth in *H. P. Hood & Sons, Inc.* . . ." *Id.* at 2. Nowhere in the Commission's opinion is reference made to the irreparable injury test which *Hood* seemingly would have required here. Hence, it seems fair to conclude that the FTC will no longer require a showing of probable irreparable harm by a party seeking confidential treatment for business records.

three problems stand out. First, the Commission has extended, rather than corrected, the erroneous analysis set forth in *Hood*. Unwarranted disclosure of confidential information unfortunately has resulted. Second, the FTC's treatment of confidential information at the hearing stage continues to be an inflexible all-or-nothing approach and less rigid alternatives have not been explored. Third, the Commission has been remiss in not developing meaningful content for the "serious injury" test by which hearing examiners are to determine whether material should be received *in camera*. Six years have elapsed since the rule was announced; this is too long a period to excuse continued failure to define the standard.

The Commission's gratuitous comments in *Columbia Broadcasting System, Inc.*,¹¹⁰ apparently issued to guide hearing examiners, are a current example of the FTC's reliance on untenable arguments. Although the argument is more sophisticated than the straight-forward punitive position in *Hood*,¹¹¹ it has no greater merit. In *CBS*, the Commission indicated (apparently without acting) that the examiner erroneously had received sales data and record club membership figures *in camera*. Its conclusion rested on the following analysis:

Competition depends for its continuing vitality upon free entry and free exit to and from industries, and entry depends in no small measure upon knowledge of opportunities, *i.e.*, knowledge of sales volumes, of probable costs, and of estimated profits. The public interest lies in encouraging entry, not in protecting the barriers erected around industries by established firms, whether these be knowledge barriers or other kinds.¹¹²

But hearings are held to determine whether respondent has engaged in any unlawful practices. By using its trial hearings as a weapon to punish alleged offenders through the spreading of business secrets on the public record, the Commission subverts the true purpose of hearings as a method for gathering evidence to ascertain the facts to which the law will be applied. Commission hearings become, in fact, penalty proceedings wherein the unlucky respondent is punished by the mere taking of evidence, regardless of the examiner's or Com-

¹¹⁰ FTC Dkt. No. 8512, 3 TRADE REG. REP. ¶ 18,037, at 20,459 (1967). There is no indication in the Commission's opinion (the record was not available for public inspection as of August 1967) that the question of confidentiality was raised before the FTC. Moreover, the Commission's order, dated July 25, 1967, makes no reference to Commissioner Dixon's opinion that certain exhibits were placed *in camera* improperly. Thus, despite the Commission ruling, these documents apparently have not been put on the public record.

¹¹¹ See text accompanying note 91 *supra*.

¹¹² *Columbia Broadcasting System, Inc.*, FTC Dkt. No. 8512, 3 TRADE REG. REP. ¶ 18,037, at 20,459 (1967).

mission's subsequent decision on the merits. Even an innocent non-party witness suffers from the application of this theory to compel disclosure of business information, despite the Commission's concession that "no demonstrable benefit accrues from disclosure."¹¹³

If the only alternative was between a silent and, perhaps, meaningless public record or full disclosure, one might be more sympathetic to the Commission. However, a simpler expedient is available to protect the FTC's concern about incomplete records, while also preventing unwarranted disclosure. The party seeking *in camera* treatment could be required to prepare a non-confidential summary of the document or testimony for inclusion in the public record.¹¹⁴ Thus, the hiatus in the record would be filled for the bar, legislative committee or scholarly critic. Of course, not every *in camera* document would lend itself to such summarization, nor would it be necessary in every case; but, where helpful, it ought to be considered.

Moreover, the Commission's rigid approach to confidential information at the hearing stage is not the result of an inexorable congressional command. As previously noted, the FTC has always had broad discretion in its handling of confidential information.¹¹⁵ Perhaps the new FTC rule providing that *in camera* orders shall henceforth include a date on which *in camera* treatment will expire,¹¹⁶ portends a more realistic approach to requests for confidential treatment.

The Commission's failure to give content to the "serious injury" standard is another example for Judge Friendly's catalogue of administrative agency failures to define and clarify general standards.¹¹⁷ An analysis of the facts of FTC cases involving sensitive business data suggests that for a fair resolution of a business secret claim, an examiner should consider (and a party seeking a protective order should

¹¹³ Crown Cork & Seal Co., FTC Dkt. No. 8687 (Comm'n Opinion June 26, 1967). But cf. FTC v. Bowman, 149 F. Supp. 624 (N.D. Ill.), *aff'd*, 248 F.2d 456 (7th Cir. 1957).

¹¹⁴ For example, sales, prices and profit figures are often included in the FTC proceedings to show the effect of certain activities on a firm's competitive position or to show that price discounts were cost justified. The exact figures need not be included in the record to make it meaningful, since it is only the relationship shown by these figures that is significant; hence, a summary stating, for example, that "exhibit X or testimony at sealed pages 1-30 shows that A's growth rate from 1961 to 1962 was 10% and that it moved from 4th to 2nd place in the industry," or that "A sold its products in store 1 at a loss and in its remaining stores at a 15% profit," would seem sufficient.

¹¹⁵ See notes 58-64 *supra* and accompanying text.

¹¹⁶ FTC Rules § 3.45(b), 32 Fed. Reg. 8454 (1967). The rules, however, do not contain any self-enforcing provision by which expired *in camera* materials can be placed in the public record. And FTC Rules § 3.45(c), *id.*, specifies that application must normally be made to the Commission pursuant to FTC Rules. § 4.11, *id.* at 8459, to obtain release of *in camera* evidence.

¹¹⁷ See H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 14 (1962). Other than its general recognition that current sales and price data will usually satisfy the "serious injury" criterion, the FTC has not been more explicit than its negative definition recounted in the text accompanying note 89 *supra*.

present evidence on) the following factors in determining whether disclosure will cause serious injury:¹¹⁸

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number to a significant degree?
2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?
3. Did the party possessing the information incur any expense in its development? Has he had a sufficient opportunity to realize an adequate return on that investment?
4. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would his competitors reap from disclosure?
5. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way?
6. What is the relationship of the possessor of the information from whom disclosure is being sought to the FTC proceeding?¹¹⁹

Government Secrets

The privilege applied by the courts, under the rubric of government secrets, is designed to protect information in the government's possession from harmful disclosure.¹²⁰ This privilege is particularly significant in FTC proceedings, since the government, as complainant, is always a party, and when information in the FTC's possession is sought, the question of privilege invariably is raised. Moreover, in contradistinction to the other privileges considered here, government secrets involve more than private rights. Trade secrets and attorney-client privileges, for example, protect private interests and relationships, and those claiming these privileges have no obligation other than to their own interests. The government secrets privilege, while it protects the government's interest in withholding information, is, in addition, subject to the constitutional requirement that adjudicative proceedings

¹¹⁸ See Note, 64 HARV. L. REV. 976, 977-78 (1951). See also RESTATEMENT OF TORTS § 757, comment c (1939).

¹¹⁹ In accord with this author's earlier criticism of the Commission's transforming the evidence-taking aspect of hearings into punishment, see text accompanying note 113 *supra*, it does seem appropriate to suggest that the Commission owes nonparty witnesses even greater protection from injury than it owes respondent. The testimonial duty may compel disclosure of information in the hearing; it should not, however, be turned into a license to ruin or injure the witness' business.

¹²⁰ See generally C. McCORMICK, EVIDENCE, ch. 15 (1954); 8 J. WIGMORE, EVIDENCE §§ 2367-79 (McNaughton rev. ed. 1961).

meet standards of procedural due process.¹²¹ The government's assertion of the privilege, if it is to be properly recognized by the court, must be consistent with the government's obligation that "justice be done."¹²² Hence, one of the prerequisites of a fair trial where the government is the complainant would seem to be that the government disclose to the respondent information which may exculpate him or substantially aid his defense.¹²³ Thus, in considering an assertion of the privilege, the court must balance the respective needs of the government and the respondent, and must evaluate whether the evidence to be suppressed would substantially aid the defense.¹²⁴

The government secrets privilege is generally applicable to three categories of information or relationships: the state secrets privilege which protects the government against having to reveal military or diplomatic information;¹²⁵ the executive privilege which is asserted to justify an executive official's refusal to appear and testify;¹²⁶ and the

¹²¹ Carrow, *Governmental Nondisclosure in Judicial Proceedings*, 107 U. PA. L. REV. 166, 169-70 (1958); see, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940). See also *FCC v. Schreiber*, 381 U.S. 279, 291 (1965).

¹²² *Communist Party of the United States v. SACB.*, 254 F.2d 314, 328 (D.C. Cir. 1958); see *Berger v. United States*, 295 U.S. 78, 88 (1935). As stated in an inscription at the Department of Justice: "The United States wins its point whenever justice is done its citizens in the courts." (quoted in *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

¹²³ A recent Supreme Court decision in a criminal case indicates that procedural due process imposes an expanded duty upon the prosecution to disclose such evidence. See *Miller v. Pate*, 386 U.S. 1 (1967). See also *Giles v. Maryland*, 386 U.S. 66 (1967); Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477; Note, 74 YALE L.J. 136 (1964). The command of fairness was summarized by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), as follows:

A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though . . . his action is not "the result of guile," . . .

¹²⁴ Since the common-law evidential privilege of the government may thus be offset by a duty to provide fair procedure, can an agency's claim of a right to withhold information be reconciled with the requirement of procedural due process?

It is not, in fact, easily reconciled. The best that so far has been said in support of nondisclosure is that "reasonable" limitations can and have been imposed on both substantive and procedural rights of due process. If this criterion is accepted, the problem in this area is to break down and define what are reasonable limitations.

Carrow, *supra* note 121, at 170.

¹²⁵ See generally Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966). Technically, state secrets go beyond mere privilege because it has been held at least once that the government may be required to withhold information it is willing to produce. See *Totten v. United States*, 92 U.S. 105 (1876).

¹²⁶ See generally Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 & n.1 (1962) (authorities collected). Dean Wigmore contended, however, that the privilege exempted the executive only from attendance at judicial proceedings, not from supplying information. 8 J. WIGMORE, *supra* note 120, §§ 2369-70. In addition to the evidentiary privilege, executive refusal to disclose information has rested on the separation of powers doctrine and on obscure "housekeeping" provisions of general statutes. See, e.g., Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Mitchell, *Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen*, 58 COLUM. L. REV. 199 (1958).

omnibus exception which is asserted to prevent disclosure of official government information,¹²⁷ running the gamut from the identity of informers and internal management materials, to staff studies unrelated to particular litigation.

FTC problems have arisen primarily with regard to the last category of government secrets: Commission proceedings generally do not involve military or diplomatic information which must be classified for reasons of national security;¹²⁸ nor do questions of executive privilege arise at the hearing stage, because the hearing examiner cannot order the appearance of Commission personnel or officers.¹²⁹ In any case, requests for testimony by FTC staff, as well as production of materials from FTC files, are treated by the Commission as discovery requests, thus obscuring the fact that the Commission has altered the usual evidentiary rule and placed the burden on the party seeking disclosure.¹³⁰

In general, the FTC has protected its files from disclosure to respondents on the grounds that across-the-board confidentiality is necessary to assure the integrity of the administrative process or that the data are within the protective confines of the work product doctrine.¹³¹ A major exception, which developed as experience was gained under the continuous hearing requirement, is that documents to be placed in evidence by Commission counsel must generally be disclosed in advance of the trial.¹³² Thus, materials in complaint counsel's possession which will be used in the presentation of his case

¹²⁷ UNIFORM RULE OF EVIDENCE 34; 8 J. WIGMORE, *supra* note 120, §§ 2374, 2378.

¹²⁸ In response to a congressional inquiry, the FTC stated that it never classified information for security reasons. However, it does designate documents "Confidential" and "For staff use only" to prevent public dissemination. SPECIAL SUBCOMM. ON GOVERNMENT INFORMATION OF THE HOUSE COMM. ON GOV'T OPERATIONS, 84TH CONG., 1ST SESS., REPLIES FROM FEDERAL AGENCIES TO QUESTIONNAIRE 207 (Comm. Print 1955).

¹²⁹ FTC Rules § 3.36, 32 Fed. Reg. 8452 (1967); *see* § 3.34, *id.* at 8459. FTC commissioners, of course, are not subject to being called as witnesses, although this point appears never to have been raised or disputed before the Commission. The Supreme Court's ruling, however, that the internal processes of an agency's decision-making cannot be probed, suggests this result. *See* United States v. Morgan, 313 U.S. 409 (1941). *But cf.* 97 C.J.S. *Witnesses* § 105 (1957).

And, if other FTC personnel are subpoenaed, the Commission itself determines whether they shall appear and the scope of their testimony. FTC Rules §§ 3.34, 3.36, *supra*. *See* School Services, Inc., FTC Dkt. No. 8729, 3 TRADE REG. REP. ¶ 18,064 (1967).

¹³⁰ *See* School Services, Inc., FTC Dkt. No. 8729, 3 TRADE REG. REP. ¶ 18,064 (1967). *Compare* L. G. Balfour Co., FTC Dkt. No. 8435, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,423 (1963), *with* R. H. Macy & Co., FTC Dkt. No. 8650, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,344 (1965). Hence, extended examination of FTC treatment of the government secrets privilege is more appropriate when considering confidentiality at the discovery stage.

¹³¹ *See, e.g.*, Sperry & Hutchinson Co., FTC Dkt. No. 8671, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,505 (1966), *aff'd*, 256 F. Supp. 136 (S.D.N.Y. 1966); School Services, Inc., FTC Dkt. No. 8729, 3 TRADE REG. REP. ¶ 17,978 (1967).

¹³² *E.g.*, Grand Union Co., 63 F.T.C. 1491 (1963).

are not confidential, even though they are in government files.¹³³ Apart from this exception, the FTC rulings have tended to adopt a policy of blanket protection of government files, thus making the testimonial duty the exception rather than the rule. Placing the burden of showing good cause for disclosure¹³⁴ on the party seeking the evidence (that is, respondent), rather than on the party seeking to suppress the evidence (that is, complaint counsel), is contrary to FTC rulings applied in connection with all other privileges¹³⁵ and to judicial rulings on most government secrets.¹³⁶

On the other hand, in the process of converting questions on the confidentiality of government information into problems of discovery, the FTC has given the term "good cause" a wholly new and more liberal meaning; rather than requiring a clearly defined and serious injury, "good cause" in this context merely requires a showing by respondent that the "material sought is relevant and useful for defensive purposes . . . [and] would not impair any overriding public interest. . . ." ¹³⁷ This easing of respondent's burden in demonstrating "good cause," however, hardly justifies the Commission approach of placing this burden on respondent, rather than complaint counsel. Nor has the Commission ever satisfactorily explained why this burden need be so placed at all. In fact, the Commission seems unaware that it is contrary to other precedent and to the theory of evidentiary privilege as an exception to the testimonial duty imposed on everyone. Certainly it is not a necessary result of considering questions of the confidentiality of government secrets at the discovery, rather than the hearing stage—although that probably explains the origins of the FTC approach.

Moreover, the reasons for restoring the burden to complaint counsel seem compelling. First, to be consistent with its public hearing requirement, the Commission should emphasize its commitment to full disclosure of all relevant evidence. It is those seeking to limit

¹³³ FTC Rules § 3.36(a), 32 Fed. Reg. 8452 (1967); *see* Seeburg Corp., FTC Dkt. No. 8682 (Interlocutory Order Mar. 27, 1967); Viviano Macaroni Co., FTC Dkt. No. 8666, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,467 (1966); Furr's, Inc., FTC Dkt. No. 8581 (Interlocutory Order Nov. 18, 1963); *cf.* Texas Indus., Inc., FTC Dkt. No. 8656, [1967-1967 Transfer Binder] TRADE REG. REP. ¶ 17,253 (1965). *But cf.* Crown Cork & Seal Co., FTC Dkt. No. 8687 (Interlocutory Order Feb. 8, 1967).

¹³⁴ FTC Rules § 3.36, 32 Fed. Reg. 8452 (1967); § 4.11, *id.* at 8454.

¹³⁵ *E.g.*, Hood, 58 F.T.C. 1184 (1961); Crown Cork & Seal Co., FTC Dkt. No. 8687 (Comm'n Opinion June 26, 1967).

¹³⁶ *See, e.g.*, 8 J. WIGMORE, EVIDENCE §§ 2378-79 (McNaughton rev. ed. 1961). Concern for the disclosure of secret data, however, has resulted in the ruling that the burden is met when the head of the executive department asserts "that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." *United States v. Reynolds*, 345 U.S. 1, 10 (1953).

¹³⁷ L. G. Balfour Co., FTC Dkt. No. 8435, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,423, at 21,294 (1963).

the testimonial duty who should be required to prove their case; if all considerations balance out, the government secrets privilege should fail, not prevail. Second, since the FTC both prosecutes and judges its own complaints, every effort should be made to maintain both fairness and the appearance of fairness.¹³⁸ Switching the burden to respondent without apparent justification and to respondent's distinct disadvantage lends an unnecessarily suspect aura to FTC proceedings. Third, it is almost impossible to prove why a document or particular testimony should be disclosed, without first having seen the document or heard the testimony. Complaint counsel, however, would not have this problem, since whoever represents the Commission's "governmental" interest usually will have seen the material and, therefore, will be able to demonstrate why disclosure is unwarranted. Placing this burden on the Commission's representative hardly can be considered either unfair or unduly burdensome. Fourth, reversing the burden would encourage the FTC to develop standards for the confidential treatment of government secrets. Under the present arrangement, the Commission is able to rely on generalities—such as that respondent has not shown "real or actual need" or that respondent has not made a supported "claim that the documents are necessary to its defense"¹³⁹—which provide little guidance as to the standards governing disclosure. The inevitable result to date has been excessive appeals and seemingly unnecessary delays. Requiring the FTC to spell out its basis for confidential treatment would not necessarily expedite hearings, but might result in fewer demands being made. Finally, if reversal of the burden required the FTC to examine the document or be apprised of the testimony, it would have an opportunity to determine whether the material was of the kind that must be disclosed as helpful to the defense. At present, decisions are often made without such knowledge¹⁴⁰ and, lacking such information, the Commission is unable to implement improved standards of fairness.¹⁴¹

¹³⁸ [W]here executive, legislative and judicial powers are blended in a single agency's activity, the resulting need [is] for adherence to scrupulous standards of fairness Public acceptance of agency decisions is not unrelated to the giving of satisfaction in these regards.

S. Doc. No. 24, 88th Cong., 1st Sess. 128 (1963); *see* Crown Cork & Seal Co., FTC Dkt. No. 8687 (Interlocutory Order Feb. 8, 1967) (dissenting opinion).

¹³⁹ *Viviano Macaroni Co.*, FTC Dkt. No. 8666, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,467, at 22751 (1966). For a telling criticism of the result reached in this case, *see* the dissenting opinion of Commissioner Elman in *Inter-State Builders, Inc.*, FTC Dkt. No. 8624; *L. G. Balfour Co.*, FTC Dkt. No. 8435, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,820 (1966).

¹⁴⁰ *Statesman Life Ins. Co.*, FTC Dkt. No. 8686, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,790, at 23,148 (1966) (dissenting opinion).

¹⁴¹ An additional difficulty has been the Commission's avoidance of questions involving plenary review of its treatment of confidential information or of complaint counsel's obligation to reveal material helpful to the defense. For example, during hearings before an examiner in *Seeburg Corp.*, FTC Dkt. No. 8682 (1966), the question

PRIOR STATEMENTS OF A PROSECUTION WITNESS

One final problem at the hearing stage involves the rule that the prosecution must disclose prior statements of a government witness. Here, again, the Commission is faced with a conflict between its duty to disclose and the need to protect confidential files.

In *Jencks v. United States*,¹⁴² a criminal case, the Supreme Court held that, at trial, the defendant was entitled to inspect prior statements by the witness relating to his testimony. Relying on its powers to control adjudicatory procedures, the Court required disclosure, whether or not the witness' testimony was inconsistent with his prior statements.¹⁴³ In rejecting claims that the prosecution, as well as the defense, should be entitled to prepare its case free from the need to disclose its working papers and that these statements were privileged and confidential, the Court recognized the overriding importance of the right of cross-examination in a criminal trial and the government's special obligation to seek justice, not victories.¹⁴⁴ However, in response to misconceived criticism, originating with Justice Clark's vigorous dissent that the *Jencks* decision would result in wholesale disclosure of law enforcement files to criminals,¹⁴⁵ Congress passed modifying legislation. The so-called "Jencks Act"¹⁴⁶ provides that "prior statements" can be disclosed only after the witness has testified on direct examination and limits the definition of "prior statements" to (1) those written or adopted by the witness or (2) "substantially

arose as to whether complaint counsel had suppressed material, "confidential" evidence. In certifying the question to the Commission, the examiner boldly stated complaint counsel's duty. Complaint counsel, he suggested, is a public official who has "an ethical and public interest obligation to inform the hearing officer of evidence not adduced which would change the interpretation of the evidence adduced if considered in context therewith." Certificate of Hearing Examiner to FTC at 1 (Feb. 3, 1967); cf. cases cited note 123 *supra*. Subsequently, the questions certified to the Commission were limited to one document, because complaint counsel altered his position and made all but two of the contested documents available. Partial Withdrawal of Certification by Hearing Examiner to FTC (Feb. 10, 1967). In ruling that the remaining document should be disclosed to respondent, the Commission declined respondent's request for plenary consideration of FTC policies as to its confidential files and made no comment on the scope of complaint counsel's "ethical and public interest obligations." Interlocutory Order (Mar. 27, 1967).

¹⁴² 353 U.S. 657 (1957).

¹⁴³ To demand that the defendant prove a variance would effectively deny the right. Unless the witness admits the inconsistency, an unlikely occurrence, the defendant is unable to know or discover the conflict without inspecting the statement. *Id.* at 666-68.

¹⁴⁴ The Court also approved the rationale that initiation of the criminal prosecution constitutes an automatic waiver of the privilege which would otherwise protect government secrets essential to the defense. If the government continues to assert the privilege, the action must be dismissed. *Id.* at 670-71; see *United States v. Beekman*, 155 F.2d 580 (2d Cir. 1946); *United States v. Andoloscsek*, 142 F.2d 503 (2d Cir. 1944).

¹⁴⁵ See Comment, 67 YALE L.J. 674, 680-82 (1958).

¹⁴⁶ 18 U.S.C. § 3500 (1964).

verbatim" transcriptions which were recorded "contemporaneously." The Act also provides for judicial *in camera* examination of the statements prior to disclosure, to insure that disclosure is limited to relevant statements; and the government is allowed the option of striking a witness' testimony to avoid production.

In the decade since its hurried passage, the Act has occasioned considerable confusion and delay in criminal trials.¹⁴⁷ It remains unclear, moreover, whether developing constitutional standards of due process will permit the Act's limitations to stand in criminal cases.¹⁴⁸ In any event, the courts have begun applying *Jencks* principles to administrative agency proceedings.¹⁴⁹ Initially, it was unclear whether the Commission would adhere to the rule outlined by the Supreme Court or the Act.¹⁵⁰ The Commission was bound by neither rule, of course, since both were limited on their face to criminal trials. This issue was resolved by the FTC in *Ernest Mark High*,¹⁵¹ where the FTC reversed its long-established position of denying production of government witness statements¹⁵² and applied the doctrine to its proceedings.¹⁵³ Specifically ruling that it would "follow the substance of

¹⁴⁷ Judicial Conference of the Second Judicial Circuit, *The Problems of Long Criminal Trials*, 34 F.R.D. 155, 168-69 (1963); Note, 38 N.Y.U.L. REV. 1133 (1963).

¹⁴⁸ Although the Court's holding in *Jencks* was not put on constitutional grounds, and the *Jencks* Act has been upheld against constitutional attack, *Scales v. United States*, 367 U.S. 203, 257-58 (1961), it is also true that constitutional commands were "close to the surface of the [*Jencks*] decision . . ." *Palermo v. United States*, 360 U.S. 343, 362-63, 365 (1959) (concurring opinion of Brennan, J., joined by Warren, C.J., Black & Douglas, JJ.). Hence, Commissioner Elman has speculated that, in order to save the Act from constitutional attack, the distinctions between the *Jencks* decision and Act may disappear. See *Inter-State Builders, Inc.*, FTC Dkt. No. 8624, L. G. Balfour Co., FTC Dkt. No. 8453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,817 (dissenting opinion: citing *Campbell v. United States*, 373 U.S. 487 (1963)); cf. *Keeffe, Jencks and Jencks*, 7 CATHOLIC U.L. REV. 91 (1958). But see Note, 16 STAN. L. REV. 1035, 1045 & n.59 (1964).

¹⁴⁹ *NLRB v. Adhesive Prods. Corp.*, 258 F.2d 403 (2d Cir. 1958); *Communist Party of the United States v. SACB*, 254 F.2d 314 (D.C. Cir. 1958).

¹⁵⁰ See Comment, 4 VILL. L. REV. 366, 374 (1959).

¹⁵¹ 56 F.T.C. 625 (1959). The charge that the Commission did not specify until *Inter-State Builders, Inc.*, whether the *Jencks* case, the Act or some modification would apply, 13 HOW. L.J. 197, 200 (1967), seems unfair. See note 154 *infra*.

¹⁵² E.g., *Trade Union Courier Publishing Corp.*, 51 F.T.C. 1275, 1298-99 (1955). The Commission, in fact, adhered to this position after issuance of the *Jencks* decision and passage of the Act, although it appeared to recognize the principle that prior statements should be produced on demand. See *Columbus Coated Fabrics Corp.*, 54 F.T.C. 1885 (1957), 55 F.T.C. 1500, 1526-28 (1959) (production limited to nonprivileged material); *Pure Oil Co.*, 54 F.T.C. 1892, 1895 (1958) (production of statement prepared by FTC attorney denied because privileged and hearsay).

¹⁵³ The Commission's decision in *Ernest Mark High*, 56 F.T.C. 625 (1959), is often cited as the FTC's initial adoption of the *Jencks* doctrine. E.g., *Inter-State Builders, Inc.*, FTC Dkt. No. 8624, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22,799 n.1; *R. H. Macy & Co.*, FTC Dkt. No. 8650, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,458 (1966). Actually, the FTC's first explicit application of the doctrine came in *Sun Oil Co.*, FTC Dkt. No. 6934 (Interlocutory Order Sept. 15, 1958); accord, *Washington Crab Ass'n*, FTC Dkt. No. 7859, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,850 (Hearing Examiner Order 1962). This may have caused some confusion among hearing examiners. See *Consumer Laboratories, Inc.*, FTC Dkt. No. 8199, [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 15,800 (Hearing Examiner Order 1962).

the Jencks statute," the Commission held that an FTC agent's summarization of a government witness' prior oral statement need not be produced, but that a writing prepared by the witness himself must be disclosed to respondent on demand following direct examination.¹⁵⁴ If there is doubt as to the nature of the report, the Commission ruled that it should be revealed only after the examiner has determined that the statement complies with these requirements. Rules of privilege, hearsay or work product would not protect reports that met these standards.¹⁵⁵ Subsequent decisions have filled in additional details. Thus, respondent's request must be made during the hearing,¹⁵⁶ the evidence must disclose the existence of the statement¹⁵⁷ and statements by non-witnesses, even though favorable to the defense, need not be disclosed.¹⁵⁸ Complaint counsel has the option of complying with the order to produce or, upon refusal to do so, of having the examiner strike the witness' testimony.¹⁵⁹

Nevertheless, as in the criminal area, questions concerning the production of *Jencks*-type statements have resulted in numerous appeals and considerable delay. During the past two years, for example,

¹⁵⁴ [I]f the fundamentals of fair play require the production of documents in an administrative proceeding pursuant to the ruling in the *Jencks* case, those same fundamentals also dictate that we should follow the substance of a statute designed to overcome interpretations leading to unfairness in the other extreme.

Considering the statute, we observe that the Supreme Court has interpreted it to encompass more than mere automatic reproductions of oral statements. Nevertheless, the Court has also stated that summaries of oral statements which evidence substantial selection of material, or which are prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, or statements which merely contain agents' interpretations or impressions, are not to be produced. Commission interview reports ordinarily are in the category of agents' summarizations. We believe that where there is doubt as to the nature of the report, the examiner should inspect it and make a determination. . . .

The writings prepared by the witnesses themselves obviously come in a different category. Four witnesses testified as to writing letters or preparing some kind of statement concerning the events about which they testified. These statements should have been produced in the circumstances shown.

. . . Ernest Mark High, 56 F.T.C. at 632-33 (citations omitted).

¹⁵⁵ But see *Bakers Franchise Corp.*, 56 F.T.C. 1636 (1959). Reports which do not meet *Jencks* standards, however, are subject to the work product privilege and hearsay objections. E.g., *Viviano Macaroni Co.*, FTC Dkt. No. 8666, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,467 (1966).

¹⁵⁶ E.g., *Bakers Franchise Corp.*, 56 F.T.C. 1636 (1959); see *Mohawk Refining Corp. v. FTC*, 263 F.2d 818 (3d Cir. 1959).

¹⁵⁷ E.g., *Basic Books Inc.*, 56 F.T.C. 69, 85-86 (1959), *aff'd*, 276 F.2d 718 (7th Cir. 1960).

¹⁵⁸ See *Royal Constr. Co.*, FTC Dkt. No. 8690, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,722 (1966); *Graber Mfg. Co.*, FTC Dkt. 8038, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,409 (1965); *Giant Food, Inc.*, 58 F.T.C. 1193 (1961). These decisions can also be questioned in light of recent developments indicating that fairness requires disclosure of exculpatory materials in the government's possession. See note 123 *supra* and accompanying text.

¹⁵⁹ E.g., *R. H. Macy & Co.*, FTC Dkt. No. 8650, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,458 (1966); *Ernest Mark High*, 56 F.T.C. 625, 633 (1959).

the FTC has decided at least six *Jencks*-type cases.¹⁶⁰ On the one hand, it has expanded Jencks Act principles by ruling that notes of an FTC investigator appearing as a government witness must be disclosed¹⁶¹ and that, in unusual circumstances, complaint counsel's correspondence with respondent's customers must be produced, even though the customers are not called as government witnesses.¹⁶² On the other hand, the Commission has declined to authorize pretrial discovery of prior statements by government witnesses.¹⁶³

In an attempt to dispel possible confusion and, perhaps, reduce appeals and delay, the Commission recently explained its views in the twin decisions of *L. G. Balfour Co.*¹⁶⁴ and *Inter-State Builders, Inc.*¹⁶⁵ First, the Commission reaffirmed its dedication to the Jencks Act as a guide for hearing procedures in the FTC. If complaint counsel objects to disclosure of a prior statement, the examiner is to inspect the report *in camera* and determine, first, whether it is a statement within the terms of the Act, and, second, whether it is relevant to the witness' testimony. After deletion of irrelevant, but not otherwise privileged or inadmissible matters, the report must be submitted to respondent. Moreover, only investigator reports meeting either the signed statement or the "substantially verbatim" and "recorded contemporaneously" tests of the Act will be available to respondent.¹⁶⁶

Commissioner Elman has disputed these decisions in a powerful dissent, arguing that the restrictive provisions of the Act should not apply to FTC procedures if the principle of fairness sought in the *Jencks* decision is to be observed.¹⁶⁷ He asserts that an agent's summarization should be disclosed, since, unlike criminal proceedings, FTC

¹⁶⁰ Royal Constr. Co., FTC Dkt. No. 8690, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,722 (1966); Sperry & Hutchinson Co., FTC Dkt. No. 8671 (Interlocutory Orders Sept. 28, 1966 & Oct. 4, 1966); Viviano Macaroni Co., FTC Dkt. No. 8666, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,467 (1966); R. H. Macy & Co., FTC Dkt. No. 8650, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,458 (1966); Inter-State Builders, Inc., FTC Dkt. No. 8624, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532 (1966); Graber Mfg. Co., FTC Dkt. No. 8038, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,409 (1965).

¹⁶¹ R. H. Macy & Co., FTC Dkt. No. 8659, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,458 (1966). The Jencks Act does not itself require disclosure in this situation because, by its terms, it is limited to disclosure of a statement "by a government witness . . . to an agent of the government." 18 U.S.C. § 3500(a) (1964).

¹⁶² Sperry & Hutchinson Co., FTC Dkt. No. 8671 (Interlocutory Orders Sept. 28, 1966 & Oct. 4, 1966).

¹⁶³ Viviano Macaroni Co., FTC Dkt. No. 8777, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,467 (1966).

¹⁶⁴ FTC Dkt. No. 8435, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532 (1966).

¹⁶⁵ FTC Dkt. No. 8624, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532 (1966).

¹⁶⁶ *Id.*

¹⁶⁷ Inter-State Builders, Inc., FTC Dkt. No. 8624, *L. G. Balfour Co.*, FTC Dkt. No. 8435, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532 (1966).

investigators seldom rely on "substantially verbatim" notes; rather, they are trained to summarize a witness' views. Moreover, the Commission itself relies heavily on these reports in issuing complaints. Their reliability is within the Commission's control and thus they should be available for impeachment purposes in FTC hearings,¹⁶⁸ since such hearings are not bound by the rules of evidence applicable in jury trials.¹⁶⁹ Otherwise, according to Commissioner Elman, "the rule of the *Jencks* case . . . will no longer play any significant role in FTC proceedings or afford any real protection to respondents in adversary proceedings where they are charged by the Commission with having violated the law."¹⁷⁰

There seems little to recommend the majority position. Its concern for the disruptive effect on witnesses, on complaint counsel and examiners of any disclosure of summaries, as contrasted with verbatim transcripts, seems unsound.¹⁷¹ The overriding concern of *Jencks*—that the government should not hide information useful to the defense—is

¹⁶⁸ [E]vidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.

John Bene & Sons, Inc. v. FTC, 299 F. 468, 471 (2d Cir. 1924).

¹⁶⁹ See, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 703-06 (1948); *Buchwalter v. FTC*, 235 F.2d 344, 346 (2d Cir. 1956); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945). See generally DAVIS TREATISE § 14.11.

¹⁷⁰ *Inter-State Builders, Inc.*, FTC Dkt. No. 8624, L. G. Balfour Co., FTC Dkt. No. 8435, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532 (1966), at 22, 813. For a different view of the purposes of the FTC Rules, see *All-State Indus., Inc.*, FTC Dkt. No. 8738, 3 TRADE REG. REP. ¶ 18,103 (1967), quoted at note 3 *supra*.

¹⁷¹ Commissioner Jones made four arguments for the majority in *Inter-State*: (1) disclosure of summaries would hamper Commission attorneys in their work, especially in conducting investigations; (2) summaries would not provide an accurate basis for cross-examination because they inevitably reflect the investigator's thoughts and subjective impressions; (3) witnesses readily could be confused and misled by respondent counsel's use of summaries; and (4) inaccurate summaries might even cause a witness to change or modify his statement "to the obvious detriment of [the] truth" *Inter-State Builders, Inc.*, FTC Dkt. No. 8624, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,532, at 22, 800 (1966). Commissioner Elman's dissent, however, seems persuasive. First, unless the "substantially verbatim" requirement is but a guise adopted by the Commission to circumvent the *Jencks* Act rule, it would equally hamper a Commission attorney's investigative performance in the same manner as a rule requiring disclosure of summaries. Thus, the majority's first argument opposes any *Jencks*-type rule. The incongruity of the majority's position is apparent when it is noted that the premise of their argument is that the summaries of attorney-investigators are neither objective nor reliable—even though the Commission relies heavily on such reports in determining whether to issue a complaint or to approve a consent decree. Cf. *Campbell v. United States*, 373 U.S. 487 (1963). Second, even if not wholly accurate, a summarized interview report may be as useful to the defense in impeaching or discrediting a witness' testimony as a signed affidavit or "substantially verbatim" recording. There is protection against inaccuracies, because, when confronted with his prior statement, the witness on cross-examination will have an opportunity to offer any relevant explanation. Third,

The purpose of the *Jencks* rule is not to shield a Government witness from embarrassment, discomfiture, or even the inconvenience of having to explain or justify alleged inconsistencies between his testimony and prior statements contained in an interview report. If it transpires that there are in fact no inconsistencies, because the report is incomplete or inaccurate or for some other reason, the net result will be to bolster his testimony. In any event,

sacrificed without sound justification. It is not enough, as one member of the Commission blandly suggests, that, since the Jencks Act procedure provides sufficient procedural protection in criminal matters, it *a fortiori* is adequate in FTC hearings.¹⁷² Different considerations may apply.¹⁷³ If the real concern of the Commission is to preserve or restore a balance between often inexperienced complaint counsel and experienced and able counsel retained by economically powerful respondents,¹⁷⁴ secreting potentially exonerating facts from the defense seems an inappropriate device to counter such power. For the same reason, the Commission's ruling that complaint counsel can avoid disclosure by "expunging" a government witness' testimony seems equally erroneous.¹⁷⁵ It, too, may result in the Commission's "winning" its case despite the presence of undisclosed exculpatory material in the FTC's files. If delay is the concern, neither *Balfour* nor *Inter-State* is likely to contribute to a solution. Appeals may in fact increase because of the ambiguity of the "substantially verbatim" and other borrowed tests.

CONCLUSION

It is time for the FTC to reconsider the bases and objectives of its confidentiality policies at the hearing level. The urgency of this need is emphasized by the fact that acceptance of FTC decisions by the business community, the bar and the public is undoubtedly dependent

whether in the end his testimony is strengthened or weakened thereby, the Jencks rule is designed to subject it to the rigorous test of cross-examination.

Inter-State Builders, Inc., FTC Dkt. No. 8624, *L. G. Balfour Co.*, FTC Dkt. No. 8453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,532, at 22,815 (1966). Finally, "the standards of fairness and decency applicable to the Government in its relation to its citizens whenever it seeks to impose upon them the penalties, sanctions, or restraints of the law" require disclosure of witness' summaries.

A Government lawyer is an advocate for a client whose interest is not so much to win a case as to do justice. And it is not just and not fair for the Government to withhold a document in its possession which, if made available to the accused, could exculpate him or assist him in making his defense.

Id. at 22,814-15 (footnotes omitted).

In terms of overall FTC litigation, moreover, the *Jencks* rule is of marginal significance. Seldom is cross-examination the cornerstone of respondent's defense, whether the charge be false advertising, discriminatory advertising allowances or an unlawful merger. This further demonstrates the inaccuracy of the majority's claim that application of the *Jencks* decision would hamper Commission investigations.

¹⁷² *Inter-State Builders, Inc.*, FTC Dkt. No. 8624, *L. G. Balfour Co.*, FTC Dkt. No. 8453, [1965-1967 Transfer Binder] TRADE REG. REP. ¶17,532, at 22,812 (1966). This ignores the absence of a tradition of criminal discovery, as opposed to a long history of discovery in the civil area.

¹⁷³ Compare Note, 68 YALE L.J. 1409, 1422-23 (1959), with Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964). See also, *Symposium—Discovery in Federal Criminal Cases*, 33 F.R.D. 47 (1963).

¹⁷⁴ Cf. Taylor, *The Supreme Court, the Individual and the Criminal Process*, 1 GA. L. REV. 386, 450-55 (1967); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

¹⁷⁵ Note, 68 YALE L.J. 1409, 1422-23 (1959).

in large part on the fairness of Commission proceedings. Moreover, procedures at the trial stage operate free from Commission control, except for the most egregious errors.¹⁷⁶ Judicial review of procedural rulings is, in addition, generally limited to the appeal of a final FTC decision on the merits;¹⁷⁷ but for most questions of confidentiality or disclosure, this review is too late to be meaningful. Only in *exceptional* cases where delay will prevent an effective remedy *and* irreparable harm is threatened or "the agency has stepped so plainly beyond the bounds of its authority, or acted clearly in defiance of it," will a district court exercise its equity jurisdiction and intervene before the agency's processes have run their course.¹⁷⁸ Such limited judicial scrutiny of evidentiary and procedural rulings in Commission hearings should spur the agency to independent review of its confidentiality procedures, rather than excuse inertia.

¹⁷⁶ The Commission will grant permission to file an interlocutory appeal only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

FTC Rules § 3.23(a), 32 Fed. Reg. 8451 (1967); *see, e.g.*, School Services, Inc., FTC Dkt. No. 8729, 3 TRADE REG. REP. ¶ 18,064 (1967); General Transmissions Corp., FTC Dkt. No. 8713, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,813 (1966).

¹⁷⁷ Review of final FTC orders to cease and desist is routed directly to the courts of appeals. 15 U.S.C. § 45(c) (1964). And such jurisdiction is exclusive. 15 U.S.C. § 45(d) (1964); *Miles Laboratories, Inc. v. FTC*, 140 F.2d 683 (D.C. Cir.), *cert. denied*, 322 U.S. 752 (1944).

¹⁷⁸ *R. H. Macy & Co. v. Tinley*, 249 F. Supp. 778, 782 (D.D.C. 1965). *See also* *Frito-Lay, Inc. v. FTC*, 380 F.2d 8 (5th Cir. 1967); *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965); *Grabber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D.D.C. 1963).